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Supreme Court
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DEC 6 1
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973
No.

FLORA PURIN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(3997)

INDEX

OPINION BELOW..... 3

JURISDICTION..... 16

QUESTIONS PRESENTED..... 16

STATEMENT..... 18

REASONS FOR GRANTING THE WRIT..... 64

CONCLUSION..... 112

TABLE OF AUTHORITIES

Cases:	Page
Agnello v. United States, 269 U.S.20 (1925)----------	67,71,74, 80,81,82, 89
Bird City Equity Mercantile Exchange v. United States, 338 F.2d 790 (10th Cir., 1964)----------	100
Bowman Dairy Company v. United States, 341 U.S. 214 (1951)----------	108
Brady v. Maryland, 373 U.S. 83 (1963) ----------	91,92
Campbell v. United States, 365 U.S. 85 (1960)----------	108
Christoffel v. United States, 200 F.2d 734 (D.C. Cir., 1953)----------	109
Edgington v. United States, 164 U.S. 361 (1896)----------	100
Enriquez v. United States, 293 F.2d 788 (9th Cir., 1961)---	77
Grunewald v. United States, 353 U.S. 391 (1956)----------	75
Harrington v. California, 395 U.S. 250 (1968)----------	93
Harris v. New York, 401 U.S. 222 (1971)----------	66,70,80, 83,86,87

Cases.

Hathcock v. United States,
441 F.2d 197 (5th Cir., 1971)--- 108

Inge v. United States,
356 F.2d (D.C. Cir., 1966)------ 85

Michelson v. United States,
335 U.S. 469 (1948)---------- 79,100

Miranda v. Arizona,
384 U.S. 436 (1966)---------- 87,89

People v. Taylor,
104 Cal. Rptr. 350, 501 P.2d
918 (S.Ct. Cal., 1972)---------- 81

Taylor v. United States,
390 F.2d 278 (8th Cir., 1968)
cert. den. 393 U.S. 869--------- 97

Thomas v. United States,
363 F.2d 159 (9th Cir., 1966)--- 76

United States v. Andolschek,
142 F.2d 503 (2d Cir., 1944)---- 109

United States v. Baum,
2d Cir., decided March 22, 83,91
1973, NO. 72-1966)----------

United States v. Beekman,
155 F.2d 580 (2d Cir., 1946)---- 109

United States v. Beno,
324 F.2d 582 (2d Cir., 1963)
cert. den. 379 U.S. 880--------- 70,79

United States v. Bonanno,
430 F.2d 1060 (2d Cir., 1970) 82,89
cert. den. 400 U.S. 964---------

Cases:
United States v. Brown,
453 F.2d 101 (8th Cir., 1971)
cert. den. 405 U.S. 978--------- 98

United States v. Bugros,
304 F.2d 177 (2d Cir., 1962)---- 106

United States v. Cotter,
60 F.2d 689 (2d Cir., 1962)----- 102

United States v. Cramer,
447 F.2d 210 (2d Cir., 1971)
cert. den. 404 U.S. 1024-------- 99

United States v. Cunningham,
446 F.2d 194 (2d Cir., 1971)
cert. den. 402 U.S. 950--------- 74

United States v. Curry,
358 F.2d 904 (2d Cir., 1966)
cert. den. 385 U.S. 873--------- 69

United States v. D'Anna,
450 F.2d 1201, 1206 (2d
Cir., 1971---------- 105

United States v. Davenport,
449 F.2d 696 (5th Cir., 1971)--- 79

United States v. Grayson,
166 F.2d 863 (2d Cir., 1948)---- 109

United States v. Greenberg,
445 F.2d 1158 (2d Cir., 1971)--- 103

United States v. Guglielmini,
384 F.2d 602 (2d Cir., 1967)
cert. den. 400 U.S. 820--------- 84

Cases:
United States v. Howard,
433 F.2d 505 (D.C. Cir.,1970)--- 98

United States v. James,
208 F.2d 124(2d Cir., 1953)----- 84

United States v. Kelly,
420 F.2d 26 (2d Cir.,1969)------ 91

United States v. Kushner,
135 F.2d 668(2d Cir., 1943)----- 100

United States v. Mahler,
363 F.2d 673(2d Cir.,1966)------ 95

United States v. Masino,
275 F.2d 129(2d Cir.,1960)------ 77,84

United States v. Paccione,
224 F.2d 801(2d Cir.,1955)------ 96

United States v. Padrone,
406 F.2d 560(2d Cir.,1969)------ 92

United States v. Poliski,
416 F.2d 573(2d Cir.,1969)------ 91

United States v. Reid,
410 F.2d 1223(7th Cir.,1969(---- 97

United States v. Rinaldi,
301 F.2d 576(2d Cir.,1962)------ 84

United States v. Sanchez,
459 F.2d 100(2d Cir.,1972)------ 111

United States v. Tramaglino,
197 F.2d 928(2d Cir.,1952)
cert. den. 344 U.S. 864--------- 84

Cases:
United States v. Wilkins,
326 F.2d 135(2d Cir.,1964)------92

United States v. Williams,
447 F.2d 894(5th Cir.,1971)-----97,105

United States v. Wooden,
420 F.2d 251(D.C. Cir.,1969)----77

Ungar v. Sarafite,
376 U.S. 575(1964)--------------112

Vierek v. United States,
318 U.S. 236(1943)--------------105

Walder v. United States,
347 U.S. 62(1954)---------------66,70,72,
80,81,83,
84,87

Statutes:

5 U.S.C. § 552(4)(b)

Rules and Proposed Rules:

41(d) F.R.Cr.P.

17 (c) F.R.Cr.P

46 F.R.D. 243

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No.

FLORA PURIN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent

TO: THE HONORABLE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF
THE SUPREME COURT OF THE UNITED
STATES

FLORA PURIN, petitioner herein, respectfully prays that a writ of Certiorari issue to review the order of the

United States Court of Appeals for the Second Circuit, entered November 7, 1973 affirming a judgment of conviction of the United States District Court for the Southern District of New York, rendered on March 23, 1973, convicting petitioner after trial by jury of two counts of distributing or possessing with intent to distribute cocaine, and sentencing her to three years imprisonment to cover both counts with immediate parole eligibility.

OPINION BELOW

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 157, 166- September Term, 1973

(Argued September 17, 1973 Decided November 7, 1973).)

Docket Nos. 73-1668,73-1947

UNITED STATES OF AMERICA,

Appellee,

-against-

FLORA PURIN and ERNANI DA SILVA,

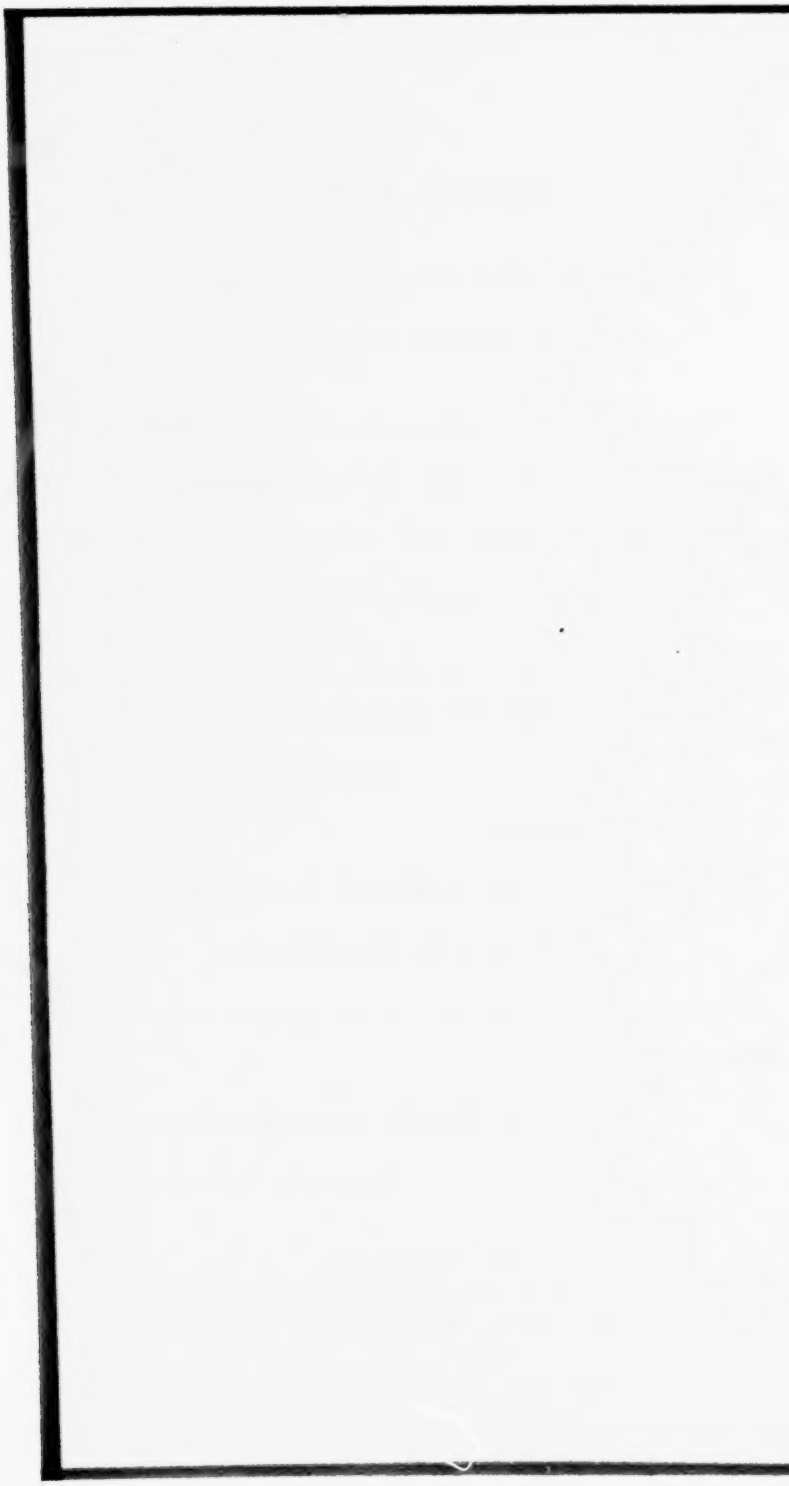
Defendants-Appellants.

Before:

SMITH, MULLIGAN and OAKES,

Circuit Judges.

Appeals from judgments of the District Court for the Southern District of New York, Hon. Charles L. Brieant,



Jr., Judge, convicting appellants of violations of the narcotics laws. 21 U.S U.S.C. § § 812,841,846.
Affirmed.

JAMES P. LAVIN, Assistant United States Attorney, (Paul J.Curran, United States Attorney for the Southern District of New York, John D. Gordan III, Assistant United States Attorney, of Counsel), for Appellee.

LAWRENCE STERN, New York, New York (Rubin, Gold and Geller, New York New York), for Defendant-Appellant Purin.

JOHN S. MARTIN, Jr., New York, New York (Martin & Obermainer, New York, Abraham D. Sofaer, of Counsel), for Defendant-Appellant Da Silva.

MULLIGAN, Circuit Judge:

These are appeals from judgments of conviction by Flora Purin and Ernani Da "ilva entered after a five-day trial before Hon. Charles L. Brieant, Jr., United States District Judge, Southern District of New York, and a jury. Purin was sentenced on March 23, 1973 to three years imprisonment on counts II and IV of a four count indictment, sentences to run concurrently. Count II charged Purin and a Paulo Romero with distributing and possessing with intent to distribute approximately 27.75 grams of cocaine on September 9, 1971 and count IV with distributing

and possessing with intent to distribute approximately 180.3 grams of cocaine on September 23, 1971 in violation of 21 U.S.C. § § 812, 841. She was acquitted on count I which had charged a conspiracy with appellant Da Silva and Paulo Romero.[1] Da Silva was convicted on count I charging the conspiracy to violate the federal narcotics laws. 21 U.S.C. §846. He was sentenced on April 26,1973 to eighteen months imprisonment.

The investigation which led to the arrest and conviction of the defendants was initiated by a New York City policeman, Michael Bergin, who was employed as a taxi driver during his vacation in April 1971. One of his passengers, Da Silva, was unable to pay his taxi fare and asked Bergin to stop at his store on MacDougal Street to get paid. On August 31,1971 Bergin and his-partner Perrigo, a Bureau of Narcotics and Dangerous Drugs(BNDD) agent, both working undercover for the New York Joint Task Force, visited Da Silva's store and stated that they were in the cocaine business and wanted a connection. Da Silva said that he thought he could line something up and asked them to call the store later that night. He gave them and envelope with the name "Lenny" written on it which he said was the name he was then using and also the

---

1 Count III charged Romero with possessing and distributing 23.45 grams of cocaine on September 16, 1971. On May 25, 1972, Romero pleaded guilty to counts II and III of the indictment. Counts I and IV were dismissed at the time of his sentencing.

telephone number of the store. Later that evening Bergin and Perrigo returned to the store. Da Silva made a phone call in their presence in a foreign language, intermittently speaking English to the agents. He quoted a price of $800 an ounce to them and when they indicated it was too high, he assured them that it was cocaine of good quality and would take a good "cut". The agents agreed to the price and suggested that they start out with a three ounce purchase. Da Silva set a date for them to return to the store on the afternoon of September 8th. At the appointed time, the agents returned. Da Silva said he didn't have the cocaine yet, made a call to a "Paulo" and asked them to come back. Later that night when they returned to the store, Da Silva introduced them to Paulo Romero who said he didn't have any cocaine then but gave the agents his phone number. The following day the agents called Romero and obtained his address. They visited his apartment on West 77th Street where he said he had made arrangemetns for a delivery of an ounce of cocaine later that evening for $800. On their return Romero directed them to drive to 15 West 72nd Street for a sample. Romero told them to drive around for 15 minutes and then entered the building. Thereafter, Romero advised that no sample could be obtained since his contact did not wish to split up the package. When the agents refused to buy, Romero returned to the apartment and secured a sample which passed muster. Perrigo then accompanied Romero to the 16th floor of 15 West 72nd Street where they were met in the hall by Flora Purin

who apologized for the precautions that had been taken but stated that she had to be careful due to the police and narcotics agents. Purin led Perrigo and Romero to a landing between the 15th and 16th floors and pulled out a brown paper bag containing the cocaine from behind a fire hose. Perrigo testified that Purin told him that if he wanted any more cocaine, he was to call Romero who would get in touch with her.

On September 15, 1971 Bergin and Perrigo again returned to 15 West 72nd Street. Perrigo went to Purin's apartment and indicated his interest in cocaine. She said that she was not interested, had none available but suggested he call again. Purin's husband Airto Moreira, arrived at the apartment and said that he knew of the prior sale. Moreira objected to cocaine and ordered Perrigo to leave. The following day Romero agreed to sell Bergin and Perrigo another ounce for $900. After testing a sample, the sale was made in Romero's apartment. It was then determined that the quanitity was short and Romero stated that he would get a makeup package from his source. Romero was observed to proceed to 15 West 72nd Street and after 15 minutes, returned to his own apartmetn where the balance of the cocaine was delivered.

On September 23 Romero advised Bergin that he could obtain eight ounces of cocaine from the same girl from whom he had gotten the drugs before, at $900 an ounce. After waiting in Romero's apartment without success, Bergin and Perrigo left. Later in the evening Romero advised Bergin on the telephone that the girl had arrived. The officers then returned to

Romero's apartment where Purin appeared. She advised Perrigo that procaine was a good cut for cocaine since it maintained the quality of the coke. She advised the officers not to talk if they were ever arrested but to contact Romero who would get them counsel. She said that she would make up any shortage in the cocaine and removed from the apartment refrigerator, a green plastic bag containing eight ounces of cocaine. Perrigo pocketed the cocaine and Bergin said he had to go downstairs to get the $7200 from his car. On his return other officers entered the apartment and made the arrests of Purin and Romero.

Purin took the stand in her own defense and substantially testified that she had been with Romero only because of a clandestine love affair. She admitted using drugs with Romero but maintained that she had stopped and denied that she was a source. Da Silva did not testify.

A) Purin

On appeal Purin's major contentions involve alleged errors in the admission of evidence. At the time of her arrest Purin was searched in the bathroom of the apartment and the policewoman who made the search found a package of about two grams of cocaine in her brassiere. Purin concededly was not indicted for the possession of this drug. At the close of its case, the Government sought to introduce this package as part of its direct evidence. This was objected to on the ground that it was evidence of an uncharged crime and that it was prejudicial. The Government argued that it was relevant to establish that Purin had access to drugs. The trial judge exclud-

ed the testimony but announced that he would permit inquiry on cross-eximanation depending on Purin's testimony. After she had testified, the trial judge stated that he would admit the evidence unearthed by the search since Purin's testimony on cross-examination was that she had stopped using cocaine before her arrest. The evidence was therefore admitted on rebuttal. Appellant argues that since there was no prior notice of the claimed brassiere cocaine, there was no opportunity for a suppression hearing to establish that the drugs were illegally seized. The trial court proceeded on the theory that whether the drug package was seized legally or not, it was admissible under the rule of Harris v. New York, 401 U.S. 222(1971).

We see no merit at all in the appellant's position that an evidentiary suppression hearing should or would have been appropriate with respect to the brassiere cocaine. It is most significant that there was no effort at all by Purin to suppress the eight ounces seized in the apartment at the same time which were the basis for count IV of the indictment. The officers had a warrant and there was clear probable cause to arrest Purin in any event. The search was made by an officer in the course of an arrest and was clearly lawful. Chimel v. California, 395 U.S. 752, 763(1969). Defendant Purin suggested on surrebuttal that the officer picked up the package from the bathroom floor and did not pluck it from her person. Since the searching officer was lawfully present and the package was in plain view even under this version of the facts, it was not illegally seized. See Harris v. United States,

390 U.S. 234, 236 (1968); United States v. Santana, slip op. 29, 30-37 (2d Cir. October 1, 1973). There are no facts in the record before us or urged on appeal which would justify an evidentiary hearing, and no claim of an illegal search was ever raised. See United States v. Culotta, 413 F.2d 1343,1345 (2d Cir. 1969), cert. denied. 396 U.S. 1019 (1970); Grant v. United States,282 F.2d 165, 170 (2d Cir. 1960).

Under the circumstances here therefore we believe that the trial court could properly have admitted the brassiere cocaine on the Government's direct case. The Government could reasonably anticipate what in fact Purin's defense attempted to establish; that she was an innocent bystander, no longer a cocaine user, and present in Romero's apartment because of her infatuation for him and not because of her interest in drug trafficking. United States v. Wright, 466 F.2d 1256, 1258-59 (2d Cir. 1972), cert. denied, 410 U.S. 916 (1973); lnited Statesvv. Deaton, 381 F.2d 114, 117 (2d Cir. 1967). The admission of this evidence in rebuttal does not constitute reversible error. The fact that it was admitted in rebuttal rather than on direct is not significant. It was relevant and probative and its admission in rebuttal was within the discretion of the trial judge. United States v. Glaziou, 402 F.2d 8, 16 (2d Cir. 1968), cert. denied, 393 U.S. 1121 (1969). The evidence against Purin with respect to both the September 9th and September 23rd sales of cocaone was overwhelming.

On rebuttal, the Government introduced into evidence the testimony of an officer Holden to the effect that after her

arrest, Purin asked why she had been arrested. When told that it was for narcotics, she stated "It's the two guys that just left [presumable Perrigo and Bergin] that brought the cocaine to the apartment. I swear to God, I never saw cocaine in my life." The trial court admitted this testimony as a false exculpatory statement which had independent probative value.[2] There is no question of the admissibility of such statements either on the Government's direct case (United States v. Tropiano, 418 F.2d 1069) or in rebuttal (United States v. Kilpatrick, 458 F.2d 864, 866-67 (7th Cir. 1972). Appellant urges on appeal that the statement was given without Miranda warnings and was therefore inadmissible.

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2. Defense counsel claimed surprise when the Government informed them of Purin's statemetns as they did when the Government sought to introduce the cocaine seized from Purin's brassiere. Even where evidence falls within the rule of Brady v. Maryland, 373 U.S. 83 (1963), however, the Government need not sua sponte give notice to the defense where the accused has knowledge of the evidence (Wallace v. Hocker, 441 F.2d 219,220 (9th Cir. 1971); see United States v. Soblen, 301 F.2d 236, 242 (2d Cir.) cert. denied, 370 U.S. 944 (1962) and here no pre-trial discovery motions were made. In any event, the Government's aborted attempts to introduce the evidence on its direct case did give the defense a full day's time to prepare.

During trial the Government advised the Court and defense counsel that the statements were volunteered and not the result of police inquiry and that no Miranda warnings had been given. The trial court granted a recess and although counsel was given the opportunity to question Purin, and the issue was presented a day later on cross-examination when Purin denied making the statement, no Miranda question was raised. In fact, on rebuttal when Officer Holden testified to the statements only a general objection was made. In view of the failure of the appellant to specifically raise the Miranda point on trial, the question cannot be raised for the first time on appeal. United States v. Bryant, 480 F.2d 785, 791-93 (2d Cir.,1973);United States v. Bell,464F.2d 667 (2nd Cir.), cert. denied,4-9 U.S.991(1972).

There is nothing in the record to indicate that the statements made were not voluntary and they were therefore properly admitted. Miranda v. Arizona,384 U.S.436,478 (1966); United States v. Tafoya, 459 F.2d 424,427 (10th Cir, 1972); United States v. Angello, 452 F. 2d 1135, 1141(2d.Cir. 1971),cert.denied 406 U.S. 922 & 409 U.S. 859 (1972); Parsons v.United States, 387 F.2d 944 (10th Cir. 1968). See also United States v. Vigo, slip. op. 5081,5086-88 (2d Cir. Sept. 11, 1973).

Purin did serve a subpoena duces tecum on the United States Immigration and Naturalization Service,directing the porduction of its files on Romero.The trial judge advised counsel that the Service had insisted that the file not be made available for examination.However,he inquired as to the reason Purin sought

the file and was advised that it would be used to impeach Romero if he was called as a Government witness and if not called by the Government, there was a strong possibility that Romero might be called as a defense witness. The trial judge stated that if this occurred, he would make available whatever material could be used properly on either direct or cross-examination. Romero, although available, was not called as a witness by either side and therefore the offer of the trial court never became an issue. It is difficult to imagine how Purin was denied a fair trial because of the rufusal of the trial judge to permit a fishing expedition. A subpoena duces tecum in a criminal case is not intended as a means of discovery. Its proported relevancy was alleged to be dependent upon Romero's appearance as a witness and that never occurred. United States v. Marchisio, 344 F.2d 653, 669 (2d Cir. 1965).

Purin also raises questions as to the propriety of the trial judge's charge here which we consider to be entirely without substance.

B) Da Silva

Appellant Da Silva's principal argument on appeal is that the evidence was insufficient to establish that he was a conspirator with Romero and Purin. Looking at the evidence most favorable to the Government (Glasser v. United States, 315 U.S. 60,80(1942); United States v. Tutino, 269 F.2d 488, 490 (2d Cir. 1959), we are persuaded that there was adequate evidence here to establish his participation

in the conspiracy. We have no quarrel with the general proposition advanced by appellant that a mere willing participation in acts with alleged co-conspirators, knowing in a general way that their intent was to break the law is insufficient to establish a conspiracy. United States v. Falcone, 109 F.2d 579 (2d Cir.), aff'd, 311 U.S.205 (1940); United States v. Peoni, 100 F.2d 401 (2d Cir. 1938). However, the facts here clearly establish that Da Silva was a knowing and willing participant in the sale of cocaine. When Bergin and Perrigo first approached Da Silva, he was advised not that they were users but rather that they had started "a cocaine business" and were "looking for a connection." He made the initial contact with Romero and was more than a mere casual conduct. He extrolled the quality of the cocaine, negotiated the price and attempted to consummate the deal in his store.

The fact that Da Silva was not present with Purin or Romero when the actual sale was transacted or that there was no evidence to establish that he knew Purin, is not significant. United States v. Bynum, slip op.5293, 5301(2d Cir. Sept. 24, 1973); United States v. Calabro, 467 F.2d 973, 982-83 (2d Cir. 1972), cert. denied, 410 U.S. 926(1973). The claim is made that Da Silva was simply doing a casual favor for a friend and was not therefore a conspirator. The conspiracy

charge given was proper,[3] and in fact was repeated at the request of the jury. They could properly infer that Da Silva had a stake in the venture and that his relationship was not peripheral. The furtive maneuvering by Romero and Purin strongly support the testimony of their expressed fear of apprehension by agents. Yet Da Silva had no difficulty making direct contact with Romero not simply to supply the wants of a user but the purported proprietors of a cocaine business. The jury was entitled to infer that Da Silva's relationship to the cocaine ring was sufficiently intimate to come within the charge given.

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3 See generally United States v. Hysohion 448 F.2d 343 (2d Cir. 1971). The trial judge instructed that a defendant to be guilty of conspiracy "must, insome sense, promote the venture himself, make it his own or have a stake in the outcome," He further instructed:

The defense contends Da Silva was not participating in a conspiracy with Purin or Romero, if there was any, and that he was merely trying to accommodate the undercover agent who had done him a favor in the past by trusting him for an unpaid taxi fare, by putting the agent in touch with Romero to get cocaine.

Well, just doing this...wouldn't of itself, if you find that that's all he did, constitute knowing participation in a conspiracy.

We find no substance in the claim that Da Silva's trial should have been severed. The trial judge initially offered a separate trial for Da Silva which was rejected by his trial counsel who feared that his role would be exaggerated if he were tried alone. The fact that the tactic was not successful is surely insufficient grounds for reversal.

We have considered appellants' other arguments and find them all to be without merit.

Affirmed.

JURISDICTION

The order of the Court of Appeals was entered on November 7, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether appellant's rights to a fair trial and to be free from illegal search and seizure were violated when the government was permitted to introduce, in rebuttal, evidence of uncharged cocaine, never noticed to the defense, after the government had been precluded from introducing this evidence on their direct case, and when this evidence was not inconsistent with appellant's direct testimony nor with those questions posed on cross-examination in an attempt to get the evidence into the case.

2. Whether the government was improperly permitted to prove appellant's consciousness of guilt by the use of statements given without the benefit of Miranda warnings and, though exculpatory, never noticed to the defense until the middle of the trial.

3. Whether the judge's charge to the jury which unduly emphasized and singled out appellant's motives to falsify, which permitted the jury to decide her guilt apart from the character evidence she presented, which implied an inference against her for her failure to call a witness avail-

able to both sides, and which charged a duty to see that the public interest is assured of a clear warning against crimes of this character, denied appellant a fair trial and due process of law.

4. Whether the Court below violated Rule 17(c) of the Federal Rules of Criminal Procedure and Appellant's Sixth Amendment right to compulsory process for the production of documents when it sua sponte denied her access to subpoenaed immigration records of Paulo Romero. Whether appellant was also denied effective representation by counsel.

S T A T E M E N T

In an indictment filed October 13, 1971, petitioner was charged with conspiracy to violate, and two counts of [illegible]on of, the laws procribing the [illegible]tion and possession with intent to d[illegible]ibute cocaine. The first count charged a conspiracy among Petitioner, Paulo Romero, and Arnani DaSilve beginning on August 1, 1971. The second count of the indictment charged petitioner of 27.75 grams of cocaine on September 9, 1971. Petitioner was not charged in the third count. In the fourth count, petitioner and Romero were charged with distribution and possession of 180.3 grams of cocaine on September 23, 1971.

Preliminary Statement

Petitioner was convicted on March 23, 1973 in the United States District Court for the Southern District of New York (Brieant, J.) of two counts of distributing, and possessing with intent to distribute cocaine (21 U.S.C. 812, 841), and sentencing her to three years imprisonment to cover both counts with eligibility for parole at any time, pursuant to 18 U.S.C. 4208 (a)(d)

On November 7, 1973, the Second Circuit Court of Appeals affirmed this judgment.

Petitioner is presently free on bail pending this petition for certiorari.

The Trial

Trial was begun on January 22, 1973, before the Honorable Charles L. Brieant. District Judge. Romero had

pleaded guilty and was awaiting sentence. Appearing for appellant on that day was William Gold, Esq., who, prior to the jury voir dire, informed the Court that he was totally unfamiliar with the case and that his partner, Alvin Geller, Esq., had been retained to try the case by the attorney of record, Deyan Brashich, Esq. Mr. Gold requested an adjournment because Mr. Geller "is presently on trial in this Court in a matter that will probably run for four or five weeks" (2*). The Court replied, "This Wednesday or Tuesday of last week was the first I heard and only by telephone with the clerks that there was going to be an attempt made to substitute a man who has already got a six to eight-week trial ahead of him, and I just won't have it" (3). In view of the

* Numbered references are to pages in the minutes of trial.

Court's refusal to adjourn the trial until Mr. Geller would become available, Mr. Gold asked for a twenty-four or thirty hour adjournment to familiarize himself with the case, and this request was also denied (4). In a later conference, Mr. Brashich appeared and informed the Court, "Mr. Geller was retained by me and by my client to be trial counsel"(10). Mr. Brashich acknowledged his responsibilities as attorney of record, but stated, "in my limitations as trial counsel, I would rather have someone who is a bit more experienced in the criminal law" (11-12). The Court adhered to its original decision to order the trial to proceed, but permitted Mr. Brashich to work together with whomever he wished (12). A jury was impaneled and the taking of testimomy began; Mr. Gold con-

tinued and examined the witnesses on behalf of the defense.

Michael Bergin, the first prosecution witness, a New York City policemen, testified that in April, 1971 he was driving a taxi on his vacation. One day he picked up DaSilva and drove him to the upper West Side. DaSilva couldn't pay the fare, but offered to pay in "speed" and then said he was kidding (46-48).

DaSilva gave Officer Bergin his business card, and one week later, Bergin visited DaSalva's store at 103 MacDougal Street in Manhattan (49).

On August 31, 1971, Bergin returned to the store with another undercover police officer named Perrigo, whom Bergin introduced as "my cousin Charles from out West." Bergin said he was in the cocaine business, looking for a con-

nection. DaSilva said he thought he could line it up and asked Bergin to call later that night(50). At 7:30 P.M. that same day in DaSilva's store and while DaSilva was speaking to someone on the telephone in a "foreign tongue," he stated to them that the price of the cocaine would be $800 per ounce. A deal was arranged for the following September 8th (53-54).

The officers returned to the store on the afternoon of September 8. DaSilva told them the cocaine was not there; after a call to someone named Paulo, he told the officers to come back later. AT 10 P.M. in the store, they were introduced to Paulo Romero who said he didn't have any cocaine. Romero offered to introduce them to some cocaine dealers, but they declined and took his phone number (56-59).

On September 9, Bergin phoned Romero and went to his apartment at 264 W. 77th Street. Romero told Bergin to return later, and at 9 P.M., the officers picked up Romero at his apartment and drove him to opposite the apartment building at 15 W. 72nd Street. Romero got out of the car and told the officers to drive around for fifteen minutes. When they returned, Romero told them at the car that a sample was not available, because the package could not be split. When they insisted they would not conclude the deal without a sample, Romero went back into the apartment building and returned with a tinfoil packet containing a white powder (61-63).

Bergin left off Perrigo and Romero at a Burger Pit, and he drove to the Joint Task Force Office where he

tested the powder and got a positive reaction. This powder was received in evidence as Government Exhibit 5 (70). Bergin drove back and picked up Perrigo and Romero and proceeded to 15 W. 72nd Street. Perrigo and Romero went into the building; twenty minutes later, they returned with a package. The officers refused Romero's request for a "snort" and drove him back to his apartment (64-72).

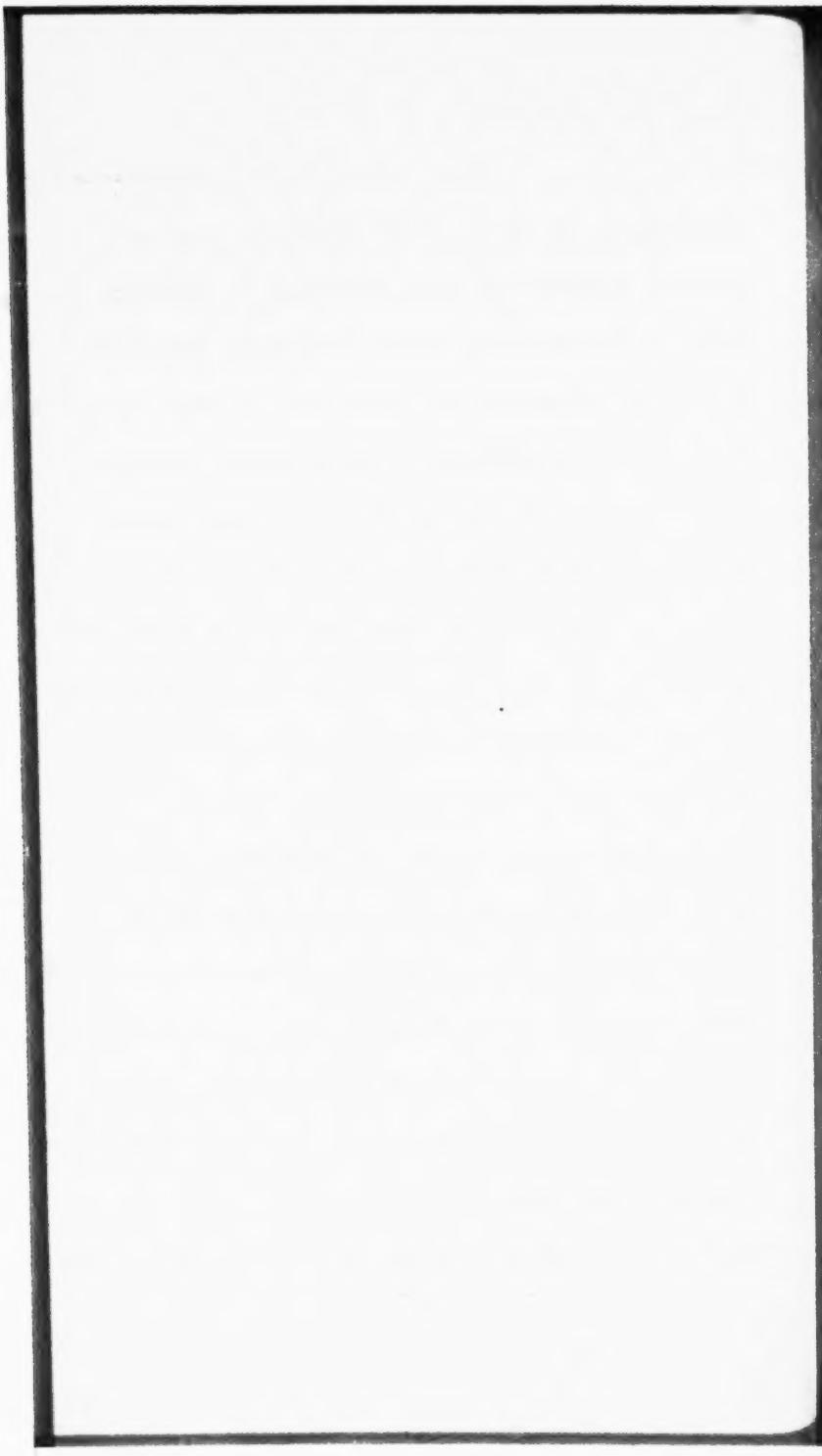
On September 15, Perrigo went into 15 W. 72nd Street and returned fifteen minutes later. The officers both went to Romero's apartment building and Bergin went in to discuss further transactions with Romero (73).

On September 16, in a phone conversation, Romero told Bergin that the price of good quality cocaine would be $900, but that he could supply

poorer quality cocaine at $700 an ounce. At 5:30 P.M., Bergin went to see Romero in his apartment. In the apartment were three women who lived with Romero at the time, one of whom was Gaynelle Grimsley (111). Bergin told Romero he would take one ounce of the good quality cocaine and one ounce of the not-so-good cocaine if it was at least of decent quality. Romero handed Bergin a sample in a tin-foil packet, inside a Marlboro pack. (Received in evidence as Government Exhibit 7-7C) (82)). The powder in the sample tested positive at the Joint Task Force Office, and the officers returned to Romero's apartment and paid him $900 and received an ounce in a white sealed envelope. They told Romero that they had no more money, left his apartment, and at their office, they discovered they had been shorted on the ounce, which did test

positive (73-84).

They returned to Romero's apartment on West 77th Street, and apprised Romero of the shortage. Romero made a phone call in a "foreign tongue" and told them to go away for a half hour. Once outside Romero's apartment, Bergin contacted a surveillance officer named Rose and told Rose, "that one of the three girls in the apartment was supposed to go up to the Bronx to pick up an ounce of the lesser quality of cocaine"(140). He also told Rose to follow Romero. Thirty minutes later, Bergin met Romero and they went into Romero's apartment where Romero gave him the make-up package. Bergin gave Romero $50, and told Romero to forget about the lesser quality cocaine. The make-up package contents tested positive at the office, and it, and the white envelope contents, all sti-



pulated to be cocaine, were received in evidence (GE 8,9) (85-92).

On September 23, Bergin spoke to Romero again and Romero said he had in his apartment 8 ounces of cocaine at $900 an ounce, "from the same girl that he had gotten the stuff from before." (97-96). The officers went to Romero's apartment at about three in the afternoon. Romero said "she" would arrive later, and spoke on the telephone, mentioning the name Flora. The officers left the apartment and when they returned at about 7 P.M., Gaynelle Grimsley was there (103), and they were introduced to another woman, Flora Purin. She told them she would help get them a lawyer if they were ever arrested, and she said that if the package was short she'd make it up. She went to the refrigerator and took out a green plastic

bag containing white powder. Romero took a "snort" and attested to its quality. Bergin gave an excuse and exited the apartment. Outside the building he signalled the surveillance agents, and they followed him back into the apartment and placed everybody, including the undercover policemen, under arrest (96-100).

Charles Perrigo, a Special Agent with the Bureau of Narcotics, and Pergin's partner in this investigation, testified that on September 9, he was waiting in the car with Bergin outside 15 W. 72nd Street. Romero came to the car and asked to see the money and then returned to the building. After Bergin had tested the sample which Romero thereafter brought with him from the building, they all returned to 15 W. 72nd Street. Perrigo and Romero got out of the car,

and while passing in front of it, Perrigo handed Romero $800. They entered the building together and took the elevator to the sixteenth floor. Appellant was standing in the hallway. She "apologized for the hassle," and said she had to be careful. She and Romero went into an apartment "for possibly an extended period of time" (205), while Perrigo waited in the hall. The two of them eventually emerged from the apartment, and Perrigo followed them to a landing between the fifteenth and sixteenth floors. Appellant reached behind a fire hose and a package fell to the ground. She picked it up and handed it to Perrigo. Perrigo asked her for her phone number in order to continue dealing, but she told him to call Romero (144-158, 195,205)

Perrigo indentified the envelope into which he had placed the

package received from appellant, but he also admitted that appellant's name was not recorded on the envelope as the person from whom the evidence was received. Instead, DaSilva and Romero are listed as the source of the evidence. The Court ruled that this omission from the envelope was a matter going to the weight of the evidence, not its admissability, and the cocaine was received in evidence (GE 6)(160-174).

On September 15, a woman's voice over the intercom at 15 W. 72nd Street admitted Perrigo to the building, and appellant admitted him to apartment 17-L [sic]. Perrigo told her he wanted to deal directly with her since Romero was upset at not getting some of their cocaine after the last deal. Appellant told Perrigo that,

> she didn't normally deal in cocaine; however, that she and her

husband both used cocaine in the music business and that she had had several ounces of cocaine available the week that I did make the 1 ounce buy from her, and the only reason she sold it to me is because she did need money for a sick friend in Brazil and that was the reason that she had it available at that time. (176)

She told Perrigo she didn't have any cocaine this time. As they were talking, appellant's husband came to the apartment. Perrigo told her husband that he had bought cocaine from appellant, and her husband said, "he wasn't too happy about the deal of my buying it from her and didn't particularly like Paulo and his hoodlums" (177). After appellant refused to introduce Perrigo to any cocaine suppliers, he left the apartment (175-177).

On September 16 in Romero's apartment, Romero questioned Perrigo about his visit to appellant and offered to get Perrigo better quality cocaine if

Perrigo would deal directly with him and pay money directly to him. Romero went to his refrigerator in his apartment and took out the ounce, which was later discovered to be short, and the officers paid him $900 (179-183).

Perrigo saw Diane Washington and three other females in the apartment during this conversation. After the deal with Romero had been consummated and the shortage discovered, Perrigo told Agent Rose that one or all of these women were going to the Bronx to get cocaine (178-179, 217-219).

Allan T. Rose, a special agent with the Bureau of Narcotics, testified that on September 16, at about 5:30 P.M., he met with Bergin and Perrigo after their exit from Romero's apartment on 77th Street. Bergin told Rose that Romero, "would be going to his source to

pick up 1 ounce of good quality cocaine. Bergin also told him that three females would leave the apartment and go to an unknown place in the Bronx, and that they would be picking up another ounce of lower quality cocaine" (236). Bergin told Rose to disregard the females and to follow Romero. Later that night, Perrigo exited Romero's apartment and told Rose that Romero would be going to his source to get a make-up package. Rose saw Romero exit his apartment on 77th Street and enter the building at 15 W. 72nd Street. Rose didn't see where Romero went in the building (234-241).

John Holden, a New York City policeman, testified that on September 23 at 8 P.M., Bergin came outside from 264 W. 77th Street and signalled a delivery. Holden went upstairs be-

hind Bergin, entered the apartment behind Bergin, and effected the arrest and took a package of cocaine from the pocket of Perrigo's army fatigue jacket. (247-288). This package was received in evidence (GE 10)(251-252).

This testimony concluded the government's direct case, and defense motions to dismiss were denied (305-306). The government had made an unsuccessful attempt to introduce uncharged and unrevealed cocaine allegedly found in appellant's brassiere at the time of arrest. The Court precluded it on the direct case (288-290). See infra. Statements she made on arrest were offered and then withdrawn (264). See infra.

Appellant Flora Purin Moreira testified that she is thirty-one and has never been convicted of crime (323). She is a professional singer and

musician, married to Airto Moreira, also a musician; they have an infant child (307). In June, 1971, while her husband was away on a concert tour with trumpeter Miles Davis, a Brizilian woman friend, Gloria Figueredo, came to stay with appellant at her apartment. Paulo Romero used to visit Gloria Figueredo at appellant's apartment, and in the process of those visits, appellant fell in love with him (307-309).

After a period of time, and growing concern for her marriage, and disenchantment with Romero, appellant told him she didn't want to see him anymore. Romero had introduced her to the use of cocaine, and one day at the end of their relationship, he asked to leave a package with her. She refused to keep the package for him, and told him to stay away from her. There was an argument in her apartment. After throw-

ing the package down, Romero threatened to tell Airto. Appellant's husband,that she was having an affair with him and that she was using cocaine with him. Romero ran out of the apartment, and appellant chased after him with the package, but he disappeared down the elevator. appellant was afraid to discard the package or keep it in the apartment, so she hid it behind the fire hose(311-313).

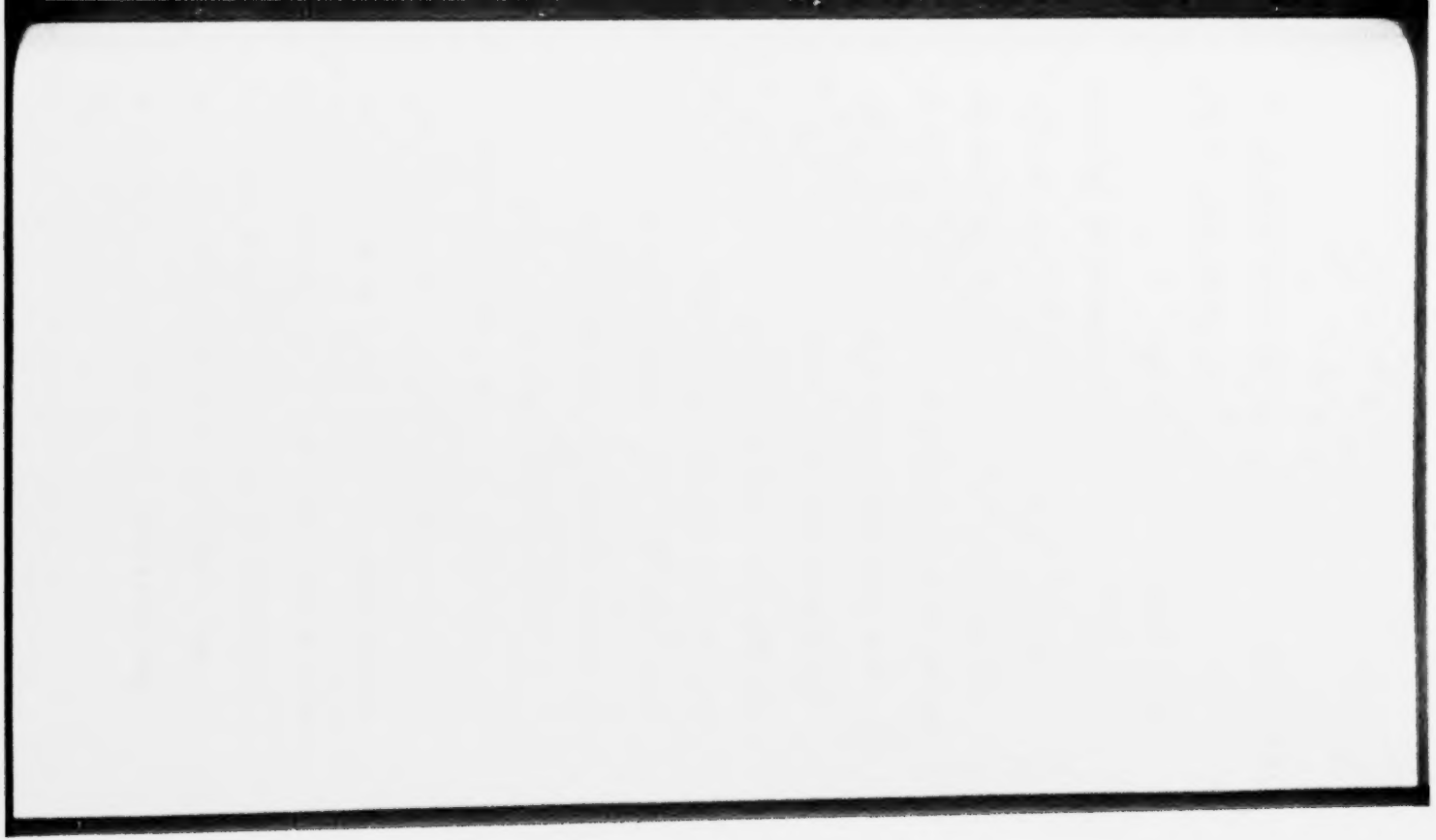
Later, that night, she was coming out of the laundry room on the sixteenth floor, eating an apple, when Romero and another man came out of the elevator. Appellant yelled at Romero in Portuguese that she had told him not to return to her apartment. She apoligized to the other man "for the hassle" and for speaking in Portuguese (329). Romero told the other man to wait and grabbed appellant by the arm and took

her into her apartment. During the ten minutes in the apartment, Romero had hold of her arm and screamed at her demanding the package he had left there that afternoon. Appellant thought Romero would beat her, so she took him to the fire hose on the landing. She extracted the package and threw it at him; it fell to the floor. Someone grabbed it from her hand as she tried to pick it up. Appellant remembered that the other man asked for her phone number, but she refused to give it to him (310-314).

On September 15, someone rang her apartment from the lobby and said he was Romero's friend and had some very important matter to discuss. At first she refused to let him up, but when he insisted and when the doorman interrupted to say she was holding up the phone, she agreed to see him for

a minute. The man came upstairs and said he wanted to buy cocaine. Appellant told him she had no business with cocaine, told him she didn't want to see him or Romero again, and asked him to leave. At that moment, Airto came home. When the man explained to Airto that he'd come for cocaine, Airto yelled at him to leave; there was almost a fist fight, but the man left. Appellant then confessed to Airto that she had been seeing Romero and had been using cocaine with him; she explained that although she and Airto had been together for the past eight years, he was no longer paying attention to her or taking her on tour with him. Airto wanted to separate (315-320).

Appellant was scheduled in a September 24th recording session with Mary Travers,of Peter,Paul,and Mary,



to be held between two and five o'clock in the afternoon. On September 23rd, she called Romero in the morning, because her guitar was in his apartment, and she needed it for the recording session.After a couple of calls, Romero told her that his friend, Luis Henriques, was bringing the guitar. She went to Romero's apartment and waited for Henriques and the guitar. She knew that there was cocaine in the apartment, but she didn't have any conversations about it with anyone there (321-323,342). While she was waiting, the arrest occurred.

Appellant was asked no questions on direct examination concerning her use or possession of cocaine, other than as in the above described events charged in the indictment. On cross-examination, the prosecutor, during questioning concerning the September 15

visit of Agent Perrigo to appellant's apartment, asked the following questions and received the following answers:

Q: Were you using cocaine at that time?

A: Yes, before that. When I met Paulo I started to use it.

Q: Did you use cocaine at that time in September, 1971?

A: I wasn't using any more at that time.

Q: You weren't using it.

THE COURT: Are you fixing a date now for that answer?

Q: September 15, when the agent came to your apartment, were you shortly before or shortly after?

MR. GOLD: Objection to the 'shortly.'

THE COURT: Yes. Sustained.

Q: Were you using cocaine September 15th?

A: No.

(336-337)

On redirect, appellant repeated her re-

sponse that she used cocaine with Paulo Romero (346-347).

The prosecutor had been precluded on his direct case from introducing evidence of any uncharged cocaine found in appellant's brassiere on September 23.

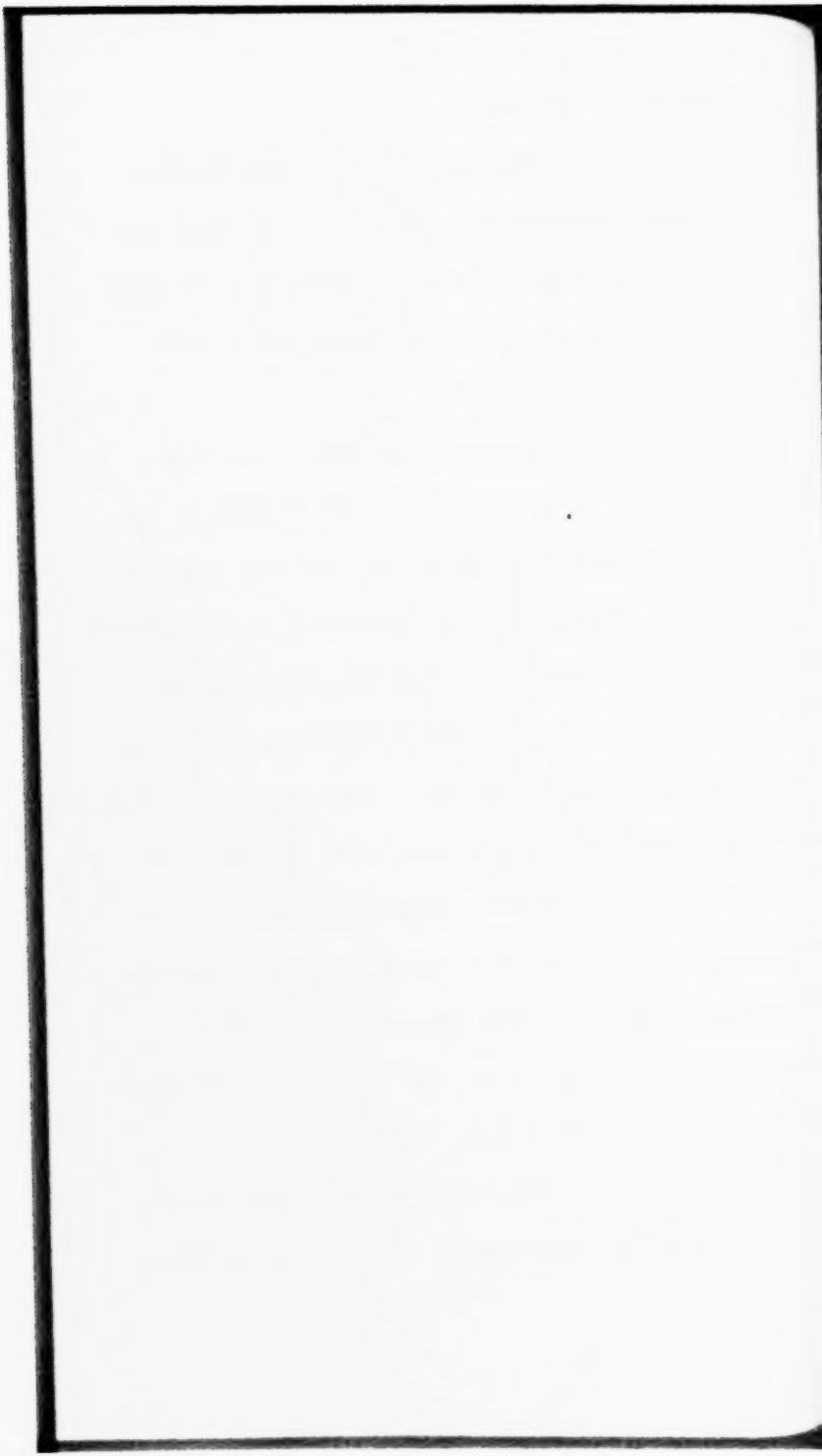
Also on cross-examination, the prosecutor questioned appellant about statements she allegedly had made upon her arrest, statements which were not introduced on the prosecutor's direct case "because it is a recent fabrication" (264), and becasue the Court had instructed the prosecutor that they should have been noticed to the defense as Brady material and because they had been made without the benefit of Miranda warnings. In response to the cross-examination, appellant denied making statements to the arresting officer about her use of cocaine or about the origin of the cocaine in the

apartment (344-346).

Appellant further testified that Romero did not come to her apartment on September 16, and he did not get the make-up package from her (338-339).

Philip Ramone, the Executive Vice President of the A and B recording Studio, testified for the defense that his studio was booked for a September 24 recording session for Mary Travers, and that appellant was scheduled to play guitar in that session. The session took place, but appellant was not there. He produced the studio logbook kept in the normal course of his business, and this logbook recited the September 24 Mary Travers session. It was received in evidence (DE C, 355-357, 361-363).

Mr. Ramone further testified that he has known appellant since



1970, as a recording artist; that he knows other people who know appellant, and that from discussions with them, he learned that her reputation for truth, honesty, and veracity is excellent (357-359).

Airto Moreira, Appellant's husband, testified that he is a professional singer and musician. He remembered coming home one night in September, 1971, and finding a man with long hair and a beard in his apartment; he identified agent Perrigo as that man. Appellant told Airto that this man was a friend of Romero's, and the man told Airto he was there to buy cocaine. Airto said he didn't like drugs and asked the man to leave. The man apologized and left (363-367).

Airto first met Romero in July, 1971, when Romero came to the apart-

ment with appellant's girlfriend, who was staying there for lack of another place to live. During the period immediately thereafter, Airto was touring with the Miles Davis and Cannonball Adderly bands (367-368).

Charles Perrigo, testifying as a defense witness, identified the envelope into which he had put the cocaine he says he received from appellant on September 9. This envelope was received in evidence as Defendant's Exhibit E. Although the nemes Romero and Macumba (DaSilva) appear on it, appellant's name is not on the envelope, nor is there any female designation such as "Jane Doe," the name used in the Agent's reports to designate an unknown female (372-383).

Reed*Taylor, the President and owner of C.T.I. Records, testified that he has known appellant both socially and professionally for five years. He has discussed her reputation for truth, honesty, and veracity with people in the United States and Brazil, and appellant's reputation among them is "above reproach" (388-390).

Anthony Arst, a motion picture producer and the president of two corporations, testified that he knows appellant professionally and socially and that she has worked for him in a motion picture and in a T.V. special in Brazil. Her reputation among

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*The Court Reporter apparently misheard the name, which is "Creed."

those who know her is "beyond reproach." Since the inception of this case, however, he heard that she might have used cocaine (390-392).

Julian Adderley, known professionally as Cannonball Adderly, testified that he plays music, is the leader of a jazz band, and the host of a T.V. talk show in Los Angeles. He has known appellant both professionally and socially for four years; they made a record together. He knows people who know her, and she has a "very good reputation among her friends" (394,392-394).

The Government's Rebuttal Evidence

At the end of its direct case, the government had offered the testimony of one Vera Tinsley, a former New York City policewoman. She was to testify that she searched appellant at the time of arrest and found a package of cocaine in her brassiere. The defense

objected that they never received notice of this uncharged crime, nowhere mentioned in the indictment: "All of a sudden we would be faced with defending a charge which, assuming that it could be proven, we would not be convicted for" (289). The United States Attorney replied, "This is to show knowledge" (288).

At first the Court stated:

> 2.62 grams. Well, it is not charged in the indictment, and I think it might become prejudicial...it seems rather inconceivable to me that you have this indictment returned which has been so carefully drafted and you have a search warrant, and you made a search and you found cocaine and didn't present that fact to the grand jury...I would decline to take it as part of the government's direct case, but I would permit you to bring it out on rebuttal if the matter becomes relevant depending on what course the case takes (289-290).

Later, after appellant's testimony,

the defense sought a definite ruling on the Tinsley testimony. The Court said, "I think the door is open to Tinsley now as a result of Miss Purin's testimony that she was not using cocaine at that time"(349). Defense counsel reiterated that this is an uncharged crime about which there was no prior notice and no opportunity for the defense to move for suppression (351-352). The Court asked if there was a claim that the warrant was void and counsel replied, "No, there is no claim whatsoever. We haven't even been given the opportunity to make a showing...she has not been given the opportunity to make any appropriate motions with regard to that" (352-353).

The Court replied:

> I think the Tinsley incident is now admissable under the rule of Harris against New York, even if the warrant under which she was arrested was void (352)...there was no

> requirement of the government to give her any notice because, in the first place, the fact was within her knowledge, and in the second place, it's being allowed only under the rule of Harris against New York (353).

Counsel further objected that it is impeachment by uncharged collateral matter which will be so prejudicial as to permit the jury to infer guilt on the crimes charged (353-354). The Court said, "I think it is some evidence which is admissable on the issue of credibility only and, of course, I would so instruct" (354).

Vera Tinsley testified on government rebuttal that she was a New York City Police Department detective in September, 1971. On September 23, of that year, she participated in a raid at 264 W. 77th Street. She searched appellant in the bathroom of the apartment and found a "white powder wrapped in tinfoil inside her brassiere" (429). This

powder was stipulated to be two grams of cocaine, and it was received in evidence (443-445).

The government offered a second rebuttal witness, Police Officer Holden, to testify to certain statements made by appellant at the time of the arrest to the effect that she never used cocaine. The government had attempted to introduce these statements in Officer Holden's direct testimony, "as a false exculpatory statement" (255). Objections were made at that time, and renewed later (403), that the defense was never given notice of these statements. The Court said, "It is exculpatory. If it is true and is believed, then she should be acquitted. It is Brady material" (254)..."The difficulty with all of that is that it was equally within her knowledge, so it is no sur-

prise to her if in fact she said it" (250).

The Court went on to say,

> I think it is probably admissible, in view of the prior testimony as to the admissions, that they used it as musicians, and also under the Amass case, and so forth, if she in fact blurted it out before she had a chance to get the Miranda warnings, but you are creating a very difficult situation here, particularly if it wasn't disclosed in advance, and you are not even fully disclosing it now...(261). It would be admissible as a false exculpatory statement (262).

After counsel had argued, "The alleged statement is not in any of the 3500 material that I have attempted to read--that I have read, rather, and it certainly smacks of a recent fabrication or recently acquired evidence" (263), and after the Court ordered a recess to enable the government to reconsider its position to "find out the facts and disclose them," (261), the

United States Attorney said he would not offer the statement "because it is a recent fabrication" (264). Then, in rebuttal, John Holden was recalled and, over objection, he was permitted to testify that when he entered the apartment on September 23, he first lead the undercover agents, Bergin and Perrigo, out of the apartment. Six to eight other armed policemen had entered the apartment with him and smoothly and routinely secured it (405). Appellant was not given the Miranda warnings (405), although Holden had plenty of time to tell everyone to sit down and remain in their positions (409). Holden returned to the apartment after leading the agents outside, and he walked up some stairs and approached appellant. She asked him why she was being arrested; he told her it was for the sale of cocaine, and she replied, "It's the

two guys that just left that brought the cocaine to the apartment. I swear to God, I never saw cocaine in my life" (404).

After this testimony, and the rebuttal testimony of Tinsley, the Court instructed the jury:

> Now, I call your attention to the fact that this particular exhibit, the cocaine, which is approximately 2 grams, is not the same item of cocaine which is referred to in the second count of the indictment. That's referred to in the indictment as 27.75 grams, and it is not the same item of cocaine that's referred to in count 4 of the indictment as being 180.3 grams.
>
> Now, this defendant, Miss Purin, Mrs. Moreira, has not been indicted for any criminal conduct in connection with this particular exhibit of cocaine, and whether or not she violated any law in connection with having that on her person on the occasion referred to, if that's in fact what happened--and, of course, as I will explain to you later, you are the entire and sole judges of the fact--is not to be considered by you as any evidence of guilt to the extent of having a different amount of cocaine at a different time, or in a diffe-

rent place, or with a different exhibit number.

You may wonder, therefore, why this evidence was permitted at all, and I will tell you what the purpose of admitting it in evidence was, and I mention it to you at this time so it will be fresh in your minds, although I will give you a full explanation of the law when we meet again on Friday.

This evidence is admitted soley, for what weight you will consider it entitled to receive, in determining the credibility of the witness Purin, Mrs. Moreira.

You will be called upon to determine whether she testified truthfully before you, and in determing that you will consider which parts of her testimony were worthy of belief and, as I will instruct you in greater detail later, if you find that she has lied in any material part, you may but you need not disbelieve and disregard the balance of her testimony, or you may believe it, or you may give it such weight, as you think it is entitled to under all of the circumstances.

The contention that's being made by this line of proof is that she had made a false exculpatory statement at the time when she had said that she never had anything to do with cocaine, or further for a possible inference that she was not using cocaine on the date of her arrest, so that if you find that she had it on her person, you may

consider that. If you find that she had Exhibit II on her person, you may consdier that soley in determing her credibility, but if somebody had 2 grams of cocaine at a particular time and place, that certainly doesn't mean that they were guilty of being a party to a conspiracy to distribute a different amount of cocaine, a different exhibit, at a different time and place.

MR. GOLD: Objection and move for a mistrial, sir.

THE COURT: Motion denied.
(447-449)

In its final charge to the jury, the Court said with respect to the exculpatory statement:

There has been testimony to the effect that defendant Purin made a statement tending to show her innocence at the time of her arrest. There has also been testimony to the effect that this statement may have been false. I charge you that if you find that this is so, that exculpatory statements when shown to be false are circumstantial evidence of guilty consciousness and have independent probative force (536).

Appellant was recalled to the stand in sur-rebuttal, and she testi-

fied that she had nothing in her brassiere when she was arrested, that she had nothing hidden on her person at the time of the arrest, and that she never saw the Tinsley cocaine, although she did see Tinsley pick up something from the bathroom floor at the time of the search (453).

This ended the taking of testimony in the case; defense motion for dismissal for the government's failure to prove guilt beyond a reasonable doubt was denied (455).

At the close of his summation to the jury, the prosecutor made the following statement to which objection was taken and overruled.

> Ladies and gentlemen, you have taken an oath, and just remember what they were doing. This is cocaine which was going to eventually find its way on to the street of the City of New York.

(500)

The Charge

> The law permits a defendant his or her request to testify in his own behalf. The testimony of the defendant Flora Purin is before you. You must determine how far it is credible. The deep personal interest which every defendant has in the result of his or her case should be considered in determining the credibility of his or her testimony. You are instructed that interest may create a motive for false testimony; but the greater the interst the stronger is the temptation, and that the interest of the defendant is of a character possessed by no other witness and therefore is a matter which may seriously affect the credence that should be place [sic] on his testimony. This, like all other issues of fact in the case, is soley for your determination.
>
> (531)

Objection was taken to this charge as highly prejudicial to appellant, especially since, "no guidance [was] given to the jury as to how to evaluate police testimony" (545-546,420).

The Court declined appellant's request to charge that reasonable doubt could be established by her char-

acter evidence (426), and the Court gave the following instruction:

> ...if after considering all the evidence in this case, including the character evidence, you have a reasonable doubt of the defendant's guilt, you should acquit that defendant.
> But if you believe beyond a reaable doubt that is a doubt based on reason--that the defendant committed any particular offense charged, you should convict that defendant of that offense notwithstanding that the evidence may also satisfy you that she always had a good reputation for honesty and truthfulness.
> (533).

Since Romero had pleaded guilty and was awaiting sentence, and since he was a key witness to the events in question and in federal custody within the government's control, and since neither defense counsel had argued for a presumption against the government from his absence, objection was taken to the following instruction (422,544):

> Now, there is no presumption against the government from

> its failure to call a witness when it appears that the testimony of the witness would be merely cumulative or repetitious and of no great value than that of the witnesses who have in fact testified. Specifically, the government has no duty to call Paulo Romero. No adverse inference can be drawn against any party for the failure to call a witness who is equally available to both sides. And I charge you that Mr. Romero was equally available during this trial to the government as well as to each of the defendants. (533-534).

The Government had not requested this charge.

The Court further charged:

> if you find beyond a reasonable doubt that the law has been violated as charged...you should not hesitate because of sympathy or any other reason to render a verdict of guilty as clear warning that crimes of this character may not be committed with impunity. The public is entitled to be assured of this. (539)

Counsel objected to the charge as a whole as "only the government's position was expounded"(545),

and, "With respect to your Honor's reference to the exculpatory statement, your reference to Tinsley, the effect upon me was that it was a government summation in terms of the devastating effect I felt it had upon the jury" (546).

On Friday, January 26,' the jury brought in a partial verdict finding appellant guilty of the substantive crime charged in count 2 of the indictment. On the following Monday ,they found her guilty of the other substantive crime (count 4) and acquitted her of the conspiracy charge (count 1) (564,569). DaSilva was convicted of the conspiracy.

The Frustrated Subpoenas

On January 18, 1973,before the start of the instant trial, the Court issued two subpoenas on behalf of the de-

fense. One was directed to the State Director of the Selective Service and the other to the District Director of the Immigration and Naturalization Service, and they each asked for the production of "any and all documents, papers and material relating to one: Paulo Ramero, a Brazilian Citizen and National." A return of "nothing found" was received as to the former subpoena (126).

During the trial, the Court stated for the record:

> A file was produced for my in-camera examination. However, counsel to the district director insists that they view this file as not subject to either examination by nor are copies of material in it to be made by any parties to this case ...I do not, in my perusal of the file, find anything relevant to this particular case. (226-227)

Counsel objected to the Court's withholding of the file when no motion to

quash the subpoena had been made by any party (228). The Court's position was that it was bound by direction from the Washington office of the Immigration Service not to disclose the file to anyone (233), and that when and if Paulo Romero were called as a witness by either party, the Court would decide what information to reveal (228-234). The defense position remained that it had a right to this information, to decide whether it would call Romero as a witness for the defense(229), and that it had a right to make its own determination without revealing its strategy to the prosecution, especially when no motion to quash had been made (230-234).

REASONS FOR GRANTING THE WRIT

I.

Appellant was not charged with two grams of cocaine allegedly found in her brassiere at the time of her arrest, nor did the defense ever receive notice that this cocaine was found or that it was to be used by the prosecution. When, at the very end of their direct case, the government announced, for the first time, that they would seek to prove this cocaine in appellant's possession, the defense objected that it was not charged in the indictment, and that the government's failure to notify them of this evidence had deprived the defense of the opportunity to move for its suppression, or even to peruse the legal basis for its seizure. The Court ruled the evidence in-

admissable on the direct case:

> ...it is not charged in the indictment, and I think it might become prejudicial... it seems rather inconceivable to me that you have this indictment returned which has been so carefully drafted and you have a search warrant, and you made a search and you found cocaine and didn't present that fact to the grand jury...I would decline to take it as part of the government's direct case, but I would permit you to bring it out on rebuttal if the matter becomes relevant, depending on what course the case takes. (289-290)

Following appellant's testimony, the Court decided to permit former Detective Tinsley to testify in rebuttal to her search and discovery of the cocaine, and the Court assumed the illegality of the search*:

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*Defense counsel further objected that this would be improper impeachment by the use of uncharged bad acts (353-354).

> I think the Tinsley incident is now admissable under the rule of Harris against New York even if the warrant under which she was arrested was void(352)...There was no requirement of the government to give her any notice because, in the first place, the fact was within her knowledge, and in the second place, it's being allowed only under the rule of Harris against New York (353).

The Court's ruling was erroneous both on the facts and the law, resulting in only the severely prejudicial effect the Court itself had recognized in this evidence. The Court incorrectly applied Harris v. New York, 401 U.S. 222 (1971), and its predecessor dealing with physical evidence, Walder v. United States, 347 U.S. 62 (1954), which hold that when a defendant opens the door on his direct testimony by board assertions specifically contradicted by the evidence illegally seized, his perjury is not shielded and

he may be impeached with that evidence. In this case, appellant made no such broad assertions; nothing in her direct testimony is in conflict with the evidence introduced collaterally. The supposed inconsistency referred to by the Court is no real inconsistency at all, and it occurred only in response to a question by the United Attorney on cross-examination, a question designed to "smuggle in" the already excluded evidence. Agnello v. United States, 269 U.S. 20 (1925).

Appellant was charged with possession and distribution of 27.75 grams of cocaine on September 9. Her direct examination by Mr. Gold took her through the events of that day, and she admitted handling the package when Romero brought it to her apartment,

and after he had threatened her, thrown it down and run out of her apartment. She admitted hiding it and abandoning it behind the fire hose on the landing, not wanting to have anything to do with it, but fearing any other alternative. Later, after more of Romero's threats, she showed him where it was.

The narcotics agent testified he visited her on September 15 and tried to get cocaine from her;appellant testified to what happened on that day, that she said she didn't have cocaine and sent the agent away.

Appellant was also charged with possession and distribution of a specific quantity, 180.3 grams, of cocaine on September 23. On direct examination, she told about the events of that day. She went to Romero's apartment to pick up her guitar for a recording ses-

sion scheduled for the following day. She knew there was cocaine in the apartment, but she had no discussions with anyone about it.

This was the extent of appellant's testimony on direct examination. There were no broad assertions that she never possessed narcotics. She specifically denied the allegations in the indictment, and she was asked nothing about cocaine on her person in the apartment on September 23, something with which she was not charged, and, according to her later testimony in sur-rebuttal, knew nothing about. The 2nd Circuit has said in Unites States v. Curry, 358 F.2d 904, 910 (1966) cert. den. 385 U.S. 873, "a defendant must be free to take the stand and to deny the elements of the crime with which he is charged without fear that his testimony

will permit the prosecution to introduce evidence illegally obtained from him and thus unavailable in the government's case in chief..." The law of Harris and Walder is consistent with this Court's statement that only when, "a defendant, in his direct testimony, falsely states a specific fact, the prosecution will not be prevented from proving, either through cross-examination or by calling its own witnesses, that he lied as to that fact." United States v. Beno, 324 F. 2d 582, 588 (2d cir.,1963) cert. den. 379 U.S. 880 (emphasis, the Court's). No specific fact testified to by appellant on direct is shown to be a lie by the cocaine on her person on September 23.

In Walder v. United States, supra, wherein the defendant had denied on direct examination ever having narcotics in his possession and wherein the

Supreme Court permitted the use in rebuttal of previously suppressed narcotics the Court also distinguished the case where no such general denial is made on the defendant's direct examination. The distinguished case, which we submit is controlling here, is Agnello v. United States, supra. In Agnello, as here, the government had unsuccessfully sought to introduce the evidence as affirmative proof in its direct case. The defendant there, as here, testified on direct examination that he in fact received the package of cocaine, but, as here, denied a mental component of the crime, knowledge in Agnello, intention and wilfullness here. It was only pursuant to government cross-examination in Agnello, in response to the broad question, "did you ever see narcotics before?" that the defendant made his general denial. The

trial Court had taken this denial as sufficient to open the door, but the Supreme Court, then, and later in Walder, said such a denial pursuant to cross-examination was insufficient. We submit that the same kind of "smuggling" operation was carried on by the prosecutor here, and that an even graver error was committed, because on the cross-examination in this case, the prosecutor did not elicit a specific fact contradicted by the rebuttal evidence.

The uncharged cocaine offered in rebuttal was allegedly taken from appellant on September 23. The prosecutor did not ask appellant directly if she had cocaine on her person on September 23: he asked her about her use of cocaine on September 15, and the Court required that he specifically fix that date in his questioning.

Q: Were you using cocaine at that time?

A: Yes, before that. When I met Paulo I started to use it.

Q: Did you use cocaine at that time in September, 1971?

A: I wasn't using anymore at that time.

Q: You weren't using it.

THE COURT: Are you fixing a date now for that answer?

Q: September 15, when the agent came to your apartment, were you shortly before or shortly after?

MR. GOLD: Objection to the 'shortly'.

THE COURT: Yes. Sustained.

Q: Were you using cocaine on September 15th?

A: No.

(336-337)

We are arguing that even had the Court not required the prosecutor to fix a date, and had appellant's answer on cross-examination, and repeated on redirect, "I wasn't

using anymore at that time, remained unclarified, the rebuttal evidence would still have been inadmissable, according to the facts and the law of Agnello. The question did not bear on her direct testimony and it was clearly an attempt to do by cross-examination and rebuttal what could not have been done by direct proof ("If the question was intended to elicit an answer that could be used as affirmative proof, it falls within the ban of Bridges v. Nixon, 326 U.S. 135 (1945)." United States v. Cunningham, 446 F.2d 194, 197 (2d Cir.,1971) cert. den.402 U.S. 950)). But, since the date was properly ordered fixed, and since the prosecutor chose to fix it at September 15, and since the question asked about use, not possession, the evidence of her possession of cocaine on September 23 did not rebut her answer and should

have been excluded.

> It is, of course, an elementary rule of evidence that prior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness. But this can be done only if the judge is satisfied that the prior statements are in fact inconsistent. 3 Wigmore, Evidence § 1040. Grunewald v. United States, 353 U.S. 391, 418-419 (1956).

The Grunewald case is quite analogous. There the defendant gave certain answers, indicating his innocence, at trial. The prosecutor sought to impeach his credibility by asking on cross-examination if he had taken the Fifth Amendment as to those same innocent answers before a Grand Jury. The Supreme Court held that his claim before the Grand Jury that these same answers might incriminate him was not inconsistent simply because the answers themselves given at trial indicated innocence. In any case, the danger of the effect on the trial jury of his Fifth Amendment claim on the issue of his

ultimate guilt of the charges, far outweighed any slight inconsistency present in the fact that he had made the Fifth Amendment claim.

> ...in this case the dangers of impermissable use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used. If the jury here followed the Judge's instructions, namely, that the plea of the Fifth Amendment was relevant only to credibility, then the weight to be given this evidence was less than negligible, since, as we have outlined above, there was not true inconsistency involved...the danger that the jury made impermissable use of the testimony..., is in light of contemporary history, far from negligible. 353 U.S. at 424.

In this case, as well, there was not true inconsistency, and the danger that the jury used this cocaine impermissably on the issue of appellant's guilt was no less than the fact of Grunewald's taking of the Fifth Amendment. In Thomas v. United States, 363 F.2d 159 (9th Cir., 1966), where the Circuit reversed a narcotics

conviction on similar grounds urged here, because the prosecutor's question did not fix a specific time and place, and because there had been no real inconsistency between the defendant's answers and the rebuttal testimony, the Circuit said,

> Thus defendant Thomas was accused of having previous dealings with, and a market for, narcotics. This was use of a statement not usable as substantive evidence of the facts stated. The crime of selling (or giving away) narcotics in the past was inferred. 363 F.2d at 163...It was before a jury. An impeachment was attempted to show the defendant Thomas had admitted traffic in Northern California in narcotics drugs. A more devastating blow to a defendant can hardly be imagined. Motivation, previously lacking for the crime charged is supplied. Id at 165. See also Enriquez v. United States, 293 F.2d 788, 794 (9th Cir., 1961); United States v. Wooden, 420 F.2d 251, 252-253 (D.C. Cir., 1969).

The 2nd Circuit's opinion in United States v. Masino, 275 F. 2d 129 (1960) is in point for two purposes. Firstly, the defendant there also admitted

to being at the scene of the transfer of narcotics, but denied the actual transfer, and there, as well, the prosecutor elicited from him on cross-examinatinn denials about uncharged crimes. The rebuttal evidence, which the Court held should have been excluded, was his using narcotics in the home of an accomplice and his buying and selling it. This evidence was so prejudicial to the defendant, going "far beyond the permissable bounds of attacking a witness' credibility," that the Court reversed the conviction. Additionally, the Court said the evidence was not properly admitted to rebut the defendant's character evidence: "The rebuttal testimony was not with reference to character or reputation as it had to do only with specific acts." 275 F.2d at 133. In the instant case, ap-

pellant offered witnesses*who testified to her reputation for truth and veracity as being excellent. The government's rebuttal cocaine could not come in against evidence of reputation for truth and veracity, since, "only hearsay or reputation testimony is permissable on the question of the defendant's character" (United States v. Beno, supra at 587); "the government may rebut by evidence that his reputation is bad...Proof of specific acts of misconduct is still not admissable." United States v. Davenport, 449 F.2d 696, 699 (5th Cir., 1971); Nichelson v. United States, 335 U.S. 469, 479 (1948).

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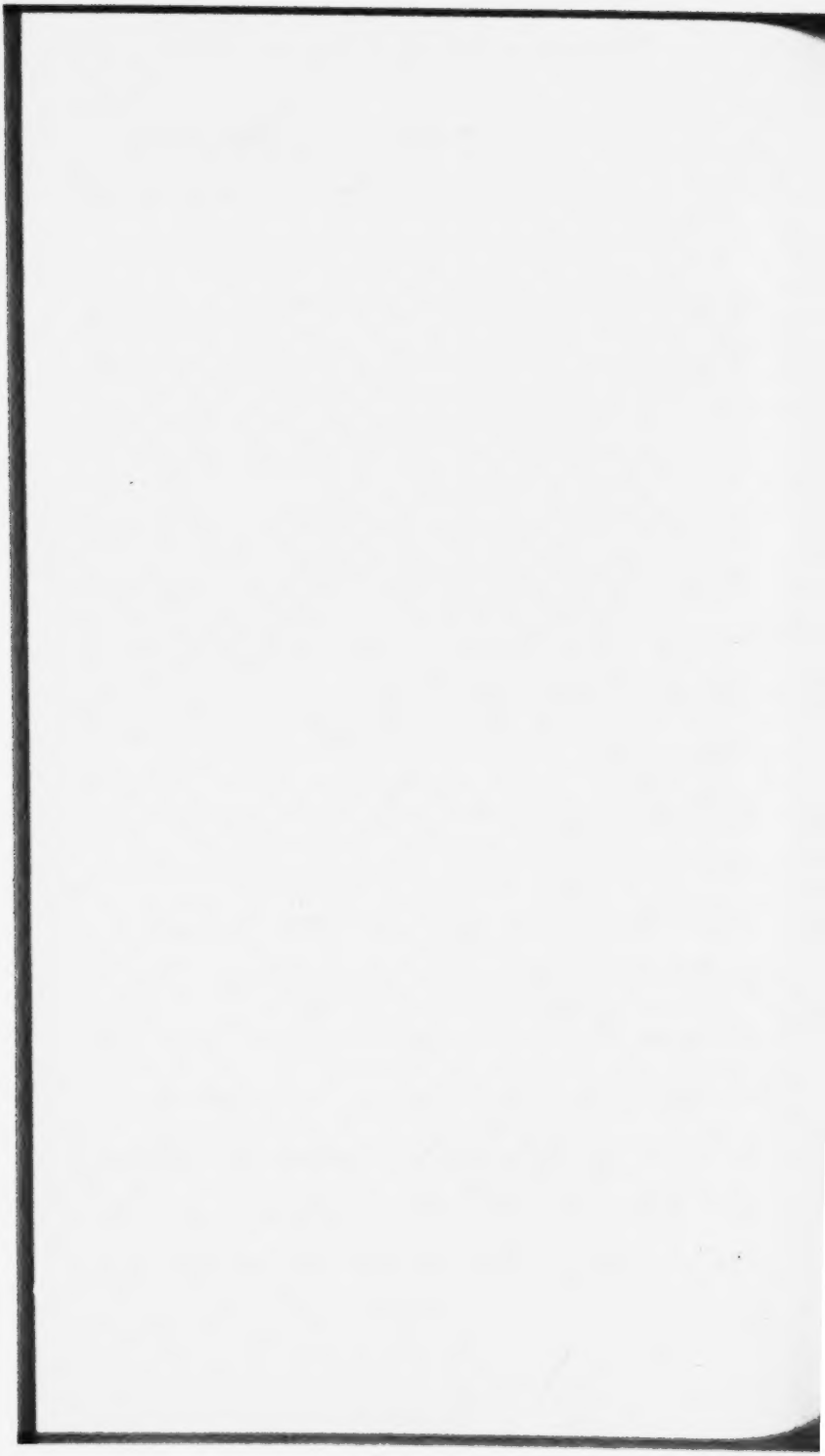
*Philip Ramone, the Executive President of A& R Recording Studio (355-363); Creed Taylor, the President of C.T.I. Records (388-390); Anthony Arst, motion picture producer and President of two corporations (390-392); Julian "Connonball"Adderly, 30 years a jazz musician, leader of a band and T.V. talk show host (392-394)

In Harris v. New York, supra, dealing with illegally extracted statements, the Court's opinion rested on the fact that the defendant's direct testimony "contrasted sharply with what he told the police shortly after arrest." 401 U.S. at 225. And, in that case, the prosecutor had made no attempt to introduce the statements in his direct case. Here, the prosecutor had made that attempt on his direct case, and the possession of the uncharged cocaine on September 23 could only work to emotionally bias the jury while having little value as actual and specific impeachment of her admissions of having used cocaine only with Paulo Romero, but not on September 15. Harris followed and revived Walder, which itself reiterated the Agnello distinction urged here. As the Supreme Court of California has re-



cently held in People v. Taylor, 104 Cal. Rptr. 350, 501 P. 2d 918, 924 (1972), Walder operates only when the defendant on direct examination makes an, "explicit and 'sweeping' claim of ignorance of all narcotics"; if the Agnello rule, preserved in Walder, is to have any meaning, then a defendant's exercise of his fundamental right to testify on his own behalf by saying as little as he can to deny the specific charges against him, cannot authorize the prosecutor to throw in a side ranging set of bad acts and drugs under the guise of impeachment.

It must further be noted that appellant's objection when this evidence was first offered by the prosecution, was timely for the purpose of the suppression ordered by the Court. Appellant denied possession of the cocaine and thus any knowledge of the existence of the evidence until its offer. The govern-

ment did not assert that it had ever given the defense any notice of it. The Court has said that the withholding of notice may not later be justified by self-serving statements by the government that the defense knew about it anyway. United States v. Bonanno, 430 F.2d 1060 (2d Cir., 1970), cert. den. 400 U.S. 964.

> There is nothing to show that, in advance of its offer in evidence, he knew that the government claimed it had searched his house and found cocaine there, or that the prosecutor intended to introduce evidence of any search or seizure. It would be unreasonable to hold that he was bound to apply for the return of an article which he maintained he never had. Agnello v. United States, supra at 34-35.

The cocaine that was the subject of the indictment and introduced in the government's direct case, came from the pocket of Agent Perrigo's jacket, while he was still in Rolmro's apartment. As far as appellant knew prior to trial, there had

been no seizure of evidence from her person or her apartment. Thus, there had been no prior opportunity to move to suppress this 2 grams of new, previously unrevealed cocaine, allegedly seized from her brassiere. United States v. Baum, (2d Cir., decided march 22, 1973, No. 72-1966).* The Court below, upon defense objection, assumed the illegality of the search and seizure and suppressed the brassiere cocaine on the government's direct case both for that reason and because it was evidence of an uncharged crime, ruling that it would be admissable in rubuttal anyway under Harris and Walder. Since, as we have argued, this latter ruling was erroneous, and

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*For a further discussion of the prejudice to the defense because of surprise, see Point II, infra.

prejudicial, and since the evidence was irrelevant and inadmissable for any purpose**(United States v. Masino, supra; United States v. Rinaldi, 301 F. 2d 301 F.2d 576 (2d Cir., 1962); United States v. James, 208 F.2d 124 (2d Cir.,1953); United States v. Tramaglino, 197 F.2d 928 (2d Uir., 1952) cert. den. 344 U.S. 864; United States v. Guglielmini,384 F.2d 602(2d Cir.,1967) cert. den 400 U.S. 820), and since the Court believed Walder permitted the use of the evidence without conducting an inquiry into the

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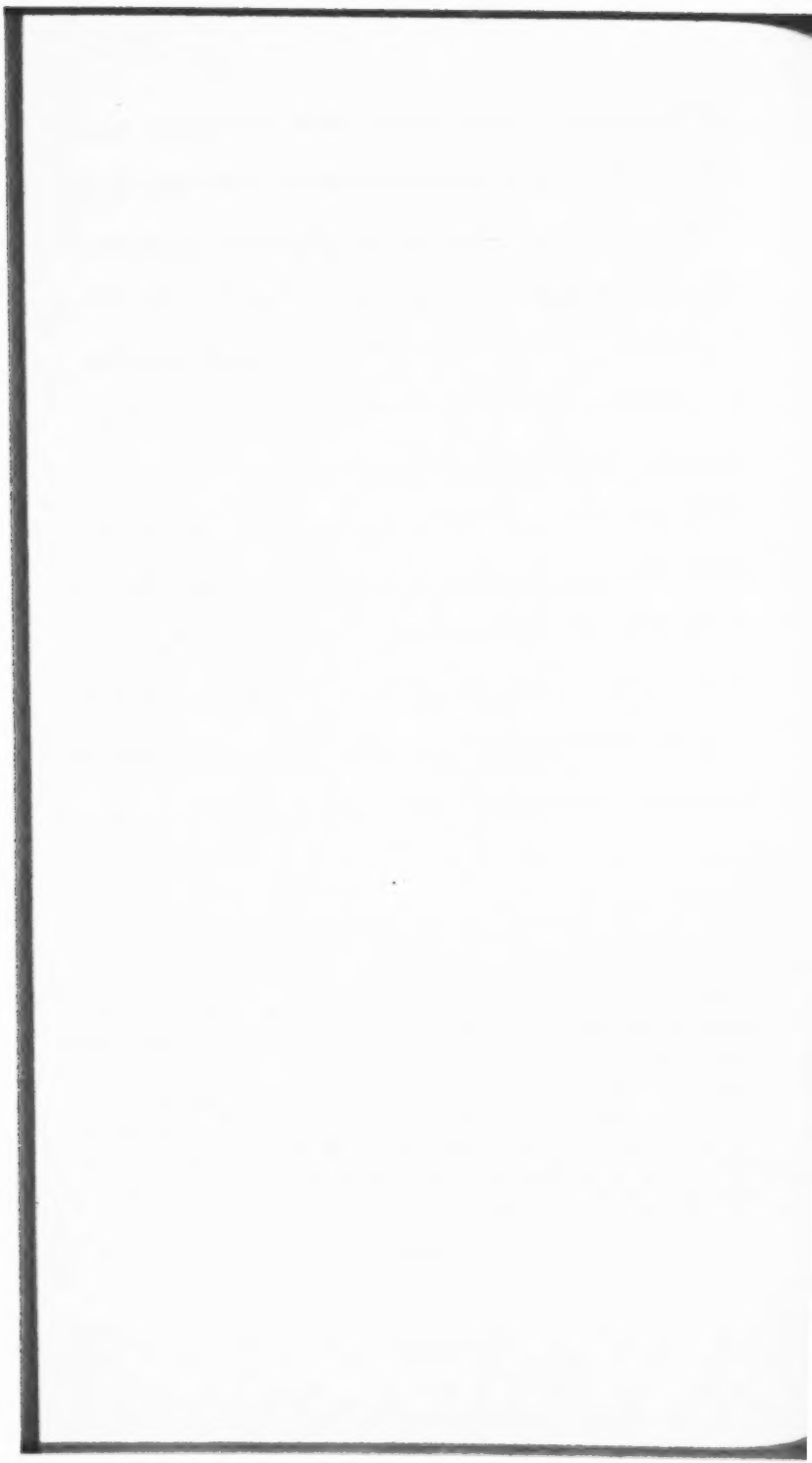
**As the Court instructed the jury, "if somebody had 2 grams of cocaine at a particular time and place, that certainly doesn't mean that they were guilty of being a party to a conspiracy to distribute a different amount of cocaine, a different exhibit, at a different time and place" (449).



circumstances of the search and seizure*. a new trial is mandated. Inge v. United States, 356 F. 2d 345 (D.C. Cir., 1966)

II

The government was permitted to use as an aid in their direct case** statements taken from appellant without the benefit of Miranda warnings. Although

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*Appellant was never given a copy of the warrant nor a receipt for the property taken, nor a written inventory. Rule 41 (d) Federal Rules of Criminal Procedure. Lawrence Stern, of counsel on this brief, requested in a phone conversation to James Lavin, United States Attorney, on April 23, 1973, a copy of the warrant and affidavits, but his request was denied. Although the undercover agents moved freely in and out of Romero's apartment, there is also evidence they broke in the door. (347)

**The fact that the statements were introduced during the government's rebuttal does not alter the direct use made of them.

the statements were exculpatory in themselves ("It's the two guys that just left that brought the cocaine to the apartment. I swear to God, I never saw cocaine in my life" (404)), the Court charged that these statements "have independent probative force" (536).

> There has been testimony to the effect that defendant Purin made a statement tending to show her innocence at the time of her arrest. There has also been testimony to the effect that this statement may have been false. I charge you that if you find that this is so, that exculpatory statements when shown to be false are circumstantial evidence of guilty counsciousness and have independent probative force.* (536)

In Harris v. New York, 401 U.S. 222 (1971), statements taken in violation

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*Objection and motion for mistrial were made when the Court originally gave this same instruction to the jury after the receipt of the evidence (449)

of Miranda v. Arizona, 384 U.S. 436 (1966) were properly used only on the issue of the defendant's credibility as to his testimony from the witness stand, and in no way was the jury permitted to use them as probative of guilt or guilty conscience during the events surrounding the crime itself. Here the statements were used as an aid to the government's "making its case," to prove that appellant was the guilty party, use expressly barred by Miranda and by Harris. And, in Walder v. United States, 347 h.S. 62 (1954), upon which Harris rests, the Supreme Court said:

> The Government cannot violate the Fourth Amendment...and use the fruits of such unlawful conduct to secure a conviction... Nor can the Government make indirect use of such evidence for its case...347 U.S. at 64-65.

These statements were taken in violation of Miranda. Appellant was in

custody for an extended period of time without the benefit of the warnings, before she made these statements. Officer Holden testified that he made the official arrest and heard the statements, but that prior thereto, he entered the apartment with eight other armed law enforcement officers and smoothly and routinely secured the custody of the people therein, and also prior thereto, Holden led the two undercover policemen out of the apartment and returned to the apartment. There was ample time to warn appellant of her rights, if not by Officer Holden, then by one of the other eight officers. There had been ample time for officer Holden to make other general announcements:

> Everybody was told to sit down and remain in their present positions once we went into the apartment and secured it, and then I went up and officially placed Romero and Miss Purin and Miss Grimsley under arrest. (409)

Thus, we submit, the police failed in their obligation to make known to appellant immediately upon her arrest her rights under Miranda, and that any statements made without benefit of those warnings should not have been used as independent probative evidence of appellant's guilt. Miranda v. Arizona, supra.

For the further reason that, as the Court below recognized, "It is Brady material" (254), the evidence should have been totally suppressed. No notice of these exculpatory statements was ever given the defense, until the first offer by the government in the middle of the trial. Appellant denies making the statements, so she may not be charged with prior knowledge of their existence, and she had no reason to move for the discovery of what she did not know to exist. Agnello v. United States, 269 U.S. 20, 34-35 (1925): United States v. Bonanno,

430 F.2d 1060 (2d Cir., 1979) cert.den. 400 U.S. 964. And, it is further possible, although the record is unclear, that the testimony of Officer Holden about these statements is a "recent fabrication" on his part. When appellant's counsel objected to their admission in evidence, he stated to the Court,

> The alleged statement is not in any of the 3500 material that I have attempted to read ___that I have read, rather, and it certainly smacks of a recent fabrication or recently acquired evidence.
> (263)

The Court ordered the United States Attorney to "find out the facts and disclose them" (216), and after a recess and further colloquy, the prosecutor stated to the Court, "The government does not offer it because it is a recent fabrication" (264). Certainly if this evidence was perjury on the part of the police, appellant has been denied a fair

trial. United States v. Polisi, 416 F.2d 573 (2d Cir., 1969). But, even if not, the government had an obligation to disclose this exculpatory matter to the defense prior to trial. Brady v. Maryland, 373 U.S. 83 (1963).

As the 2nd Circuit said in United States v. Kelly 420 F.2d 26, 29 (1969). "The course of the government smacks too much of a trial by ambush, in violation of the spirit of the rules." In this case, the government concealed both these exculpatory statements and the uncharged cocaine (Point I, supra) and tried to introduce both in the middle of the trial, totally surprising the defense. United States v. Baum, (2d Cir., decided March 22, 1973, No. 72-1966). True, the defense had not moved to discover these items, but they also had no reason to believe they existed;

the fairness behind the rules of discovery mandated open government disclosure. In Kelly, supra, it was the failure of the government to disclose the results of some complicated scientific tests on narcotics, but in United States v. Padrone, 406 F.2d 560 (2d Cir., 1969), the failure to disclose statements taken from the defendant after his arrest mandated reversal. And, in United States v. Wilkins, 326 F. 2d 135 (2d Cir., 1964), the failure to disclose Brady material, even when no request is made, is so prejudicial to a defense that reversal is necessary.

Nor can the admission of these statements be considered harmless error on the issue of consciousness of guilt. Allowing the jury to infer consciousness of guilt from the statements, if they were found to be false, is the same as allowing the statements to be regarded

as admissions of guilt at the time of arrest. If she made a false statement, she thought she was guilty; if she thought she was guilty, she is guilty. Such evidence could not but play an important role in the jury's determination of guilt. Harrington v. California, 395 U.S. 250 (1968).

III

Appellant's defense that she was an unwilling and unintentional actor in the events charged as crimes against her, and that it was Paulo Romero, not she, who was the cocaine dealer responsible for the charged sales to the undercover agents, depended entirely on her own testimony, and the credibility to be accorded it by the jury, and on the character witnesses she presented on her behalf. It is our submission here that that defense was effectively negated by the Court's

charge erroneous on the law and weighted heavily in favor of the government and against appellant on the issues. The pattern of the charge was to single out appellant when illustrating how an unfavorable inference could be applied (the motive to falsify), and to single out the government when illustrating how no unfavorable inference could be applied (failure to call a witness). As counsel stated at the conclusion of the charge, "only the government's position was expounded...it was a government summation in terms of the devastating effect I felt it had upon the jury" (545-546).

A. The Overly Extensive, Unduly Emphasized, and Unbalanced Charge on Appellant's Motive to Falsify.

The Court singled out appellant's testimony and her motive to falsify, and, in a long paragraph on the point, emphasized only that motive, without caution-

ing that it did not render her testimony unworthy of belief, and without any indication that the government witnesses had their own special interests in the case. Objection was duly taken.

> The law permits a defendant his or her request to testify in his own behalf. The testimony of the defendant Flora Purin is before you. You must determine how far it is credible. The deep personal interest which every defendant has in the result of his or her case should be considered in determining the credibility of his or her testimony. You are instructed that interest may create a motive for false testimony; but the greater the interest the stronger is the temptation, and that the interest of the defendant is of a character possessed by no other witness and therefore is a matter which may seriously affect the credence that should be place [sic] on his testimony. This, like all other issues of fact in the case, is soley for your determination.
>
> (531)

We submit that this is the case posited by Judge Feinberg in his opinion in United States v. Mahler, 363 F.2d 673,

678 (2d Cir., 1966), where none of the balancing factors is present which would otherwise preserve such a charge from becoming a total negation of a defendant's testimony. Judge Feinberg said of the charge in that case:

> Of course, such a charge may be unfair in a given context, but we have read the entire charge and the instruction was neither unfair nor misleading. The jury was also told that self-interest did not necessarily result in lies, that key government witnesses also had an interest in the outcome of the case, that their testimony and Mahler's both had to be 'weighed with a great deal of care,' and that the jury had to determine whose version to accept.

In this case, the jury was not told any of these things, and, instead of the charge approved in United States v. Paccione, 224 F.2d 801, 803 (2d Cir., 1955) ("...generally...that the jury should take into account the interest, if any, which a witness had...and that

the appellant, who testified in his own defense, was an interested witness."), the jury in this case received a devastatingly one-sided directive to disbelieve appellant. Where a defendant's case rests entirely on her credibility, it is essential that the jury get a balanced credibility instruction without implications that the defendant is singled out for disbelief while the government witnesses are not mentioned, except perhaps in the most general terms. United States v. Reid, 410 F.2d 1223 (7th Cir., 1969); United States v. Williams, 447 F.2d 894 (5th Cir., 1971).

In the Eighth Circuit, such singling out of the defendant witness has continually been disapproved, since Mr. Justice Blackmun wrote in Taylor v. United States, 390 F.2d 278, 285 (1968) cert.den. 393 U.S. 869.

> We would prefer that the defendant not be singled out. His interest is obvious to the jury. A general reference such as 'including the defendant' should suffice. Or the simple instruction proposed by Mathes and Deirtl. Federal Jury Practice and Instructions § 9.12 (1965), namely, 'A defendant who wishes to testify, however, is a competent witness; the defendant's testimony is to be judged in the same way as that of any other witness,' might be considered for use and should withstand attack of the kind present here.

See also, United States v. Brown, 453 F. 2d 101 (8th Cir., 1971) cert. den. 405 U.S. 978; United States v. Howard, 433 F.2d 505, 512 (D.C. Cir., 1970).

Appellant was sorely prejudiced by the instruction in this case, and the conviction should be reversed.

B. Consider Evidence of Guilt Apart from Character Evidence.

The Court declined appellant's request to charge that reasonable doubt could be established by her character evi-

dence and, instead, charged,

> ...if you believe beyond a reasonable doubt...that the defendant committed any particular offense charged, you should convict that defendant of that offense notwithstanding that the evidence may also satisfy you that she always had a good reputation for honest and truthfulness.
>
> (533)

This passage of the charge came immediately after, and thus totally negated, prior statements of the Court to the effect that the jury could acquit if all the evidence, including the character evidence, left a reasonable doubt. Not only did the Court thus fail to charge, as is required when a defendant places his character in issue, that the character evidence alone may raise a reasonable doubt (United States v. Cramer, 447 F.2d 210,219 (2d Cir., 1971) cert. den. 404 U.S. 1024), but here, the Court allowed the jury to first determine guilt without

the character evidence and then to disregard it entirely. We submit that this destroys any value in the character evidence, the offering of which has always been a right of the defendant. Michelson v. United States, 335 U.S. 469 (1948). A similar charge was disapproved by this Court in United States v. Kushner, 135 F.2d 668, 674 (1943).

Again, appellant's character, credibility, reputation for truth and veracity among her colleagues in the music business, was her defense. The government's case rested on the testimony of its undercover agents. The Court here removed the balanced choice the jury should have been charged to make, and the error was obviously prejudicial. Bird City Equity Mercantile Exchange v. United States, 338 F.2d 790 (10th Cir., 1964); Edgington v. United States, 164 U.S. 361 (1896).

C. The Failure to Call Romero

Again, where there was singling out to be done, the Court did it in such a way as to positively protect the government, while leaving a negative inference against appellant. Neither side had called Paulo Romero as a witness*; he was in Federal custody, awaiting sentence on his plea of guilty to this indictment. Neither side argued presumption against the other for their failure to call him. The government did not request a charge. But, ensuring that the jury would not hold it against the government, (because Romero's testimony would only be "cumulative" of

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*Appellant attempted to subpoena Immigration Service information on Romero to decide whether or not to call him, but the Court blocked the subpoena sua sponte. See Point IV, infra.

the "government" case), the Court charged, over defense objection,

> there is no presumption against the government from its failure to call a witness when it appears that the testimony of the witness would be merely cumulative or repetitious and of no greater value than that of the witnesses who have in fact testified. Specifically, the government has no duty to call Paulo Romero.
> (533-534)

Although the Court went on to say that, "no adverse inference can be drawn against any party," it did not charge specifically, as it had just done for the government, that no inference could be drawn against appellant. Thus, the pattern referred to in the introduction to this point was established.

Although it is our position that Romero, a guilty pleading defendant in Federal custody, who may have been a hostile witness for the defense, should have been called by the government and was more available to them (United States v. Cotter,

60 F. 2d 689, 692 (2d Cir.,1932), that position was not urged on the Court below. No request for a charge against the government was made. But, at the very least, since no charge had been requested by anyone, and since the witness was theoretically available to both parties, and since the Court had precluded defense subpoenas of Romero's records (Point IV), either nothing should have been said by the Court, or a balanced, simple, "no inferences against either party" charge should have been given. United States v. Greenberg, 445 F.2d 1158, 1163 (2d Cir., 1971). The effect of the charge, we submit, indicated to the jury the Court's leanings, indicated where the unfavorable inference could be laid, indicated that Romero's testimony would have been "cumulative" and thus supportive of the government's case, and further erroneously da-

maged the credibility of appellant's defense.

D. Consider the Nature and Gravity of The Crime.

There has been a mistrial in this case during the voir dire of the jury*. On information and belief, the reason for that mistrial was that jurors on the panel were overheard to make comments indicating that they would not render a fair verdict on the evidence in a drug case.

Both the prosecutor and the judge made remarks during this second trial, which could only have had the effect of arousing similar passions in this second jury. The prosecutor said at the close of his summation (and objection was made

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*Counsel has learned of this from appellant's attorney of record below, and at page 3 of the trial transcript, the Court states, "almost a year ago...there was a mistrial..."

and overruled),

> Ladies and gentlemen, you have taken an oath, and just remember what they were doing. This is cocaine which was going to eventually find its way on to the street of the City of New York.
>
> (500)

The Court also charged,

> you should not hesitate because of sympathy or any other reason to render a verdict of guilty as clear warning that crimes of this character may not be commited with impunity. The public is entitled to be assured of this.
>
> (539)

Under the circumstances of this case, when both Court and prosecutor must have been aware of the prior mistrial and its causes, and, in general when such remarks have nothing to do with whether there was enough evidence of appellant's guilt in this case, these remarks were prejudicial and reversible error. United States v. Williams, 447 F.2d 894 (5th Cir., 1971) Vierect v. United States, 318 U.S. 236 (1943); United States v. D'Anna, 450

F.2d 1201, 1206 (2d. Cir., 1971); United States v. Bugros, 304 -.2d 177 (2d Cir., 1962).

IV

There was no motion by any party to quash the subpoena issued on appellant's behalf and directed to the production of the immigration records of Paulo Romero. These records were necessary to the ultimate defense determination to call or not to call as a witness, Paulo Romero, the man who had pleaded guilty to the charges in the instant indictment and who was awaiting sentence while in federal custody during this trial. Romero may have been a hostile witness for these reasons, and because it was appellant's defense that he was the source of the cocaine charged in the indictment. It is our submission that the Court was not empowered to decide on its own, without a party's motion to quash, to deny appellant access to these materials, and the Court erroneously

damanded a showing and a guarantee that Romero would be called as a witness before turning them over piecemeal.

No motion was made by the government, and, instead, the Court said it was following some vague directive from the Immigration Service not to reveal these documents. Rule 17(c) of the Federal rules clearly states

> The Court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.

Not only was the Court's action a violation of this rule, but it was a violation of the Sixth Amendment right to compulsory process, a right which may not be conditioned on a defendant's binding himself in advance to introduction at trial of the evidence subpoenaed. The burden is on the government, upon proper motion, to show the frivolousness of the request, and we have shown here that

there was every reason for the defense request. Hathcock v. United States, 441 F.2d 197 (5th Cir., 1971).*

In Bowman Dairy Co. v. United States, 341 U.S. 214 (1951), the Court held that under Rule 17 (c) any document or other material which has been obtained by the government from third persons and which may be admissable in evidence is subject to subpoena, but need not actually be used. A Court is empowered to control the subpoena only upon a motion to quash. 341 U.S. at 220. The Court also distinguished between Rule 16, discovery, and Rule 17, production, but

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*"the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary...they thus had no way of knowing the significance of its contents to the question the judge was to determine, it saddles an unfairly severe burden on them to require them to subpoena Toomey as their witness." Campbell v. United States, 365 U.S. 85, 96 (1960).

sustained a defendant's right to use Rule 17 when he anticipates the introduction in evidence of the materials sought.

In this case, the materials sought are not specifically exempted from disclosure by statute (cf. 46 F.R.D. 243; 5 U.S.C. § 552(4)(b)), and if they were, the importance of this information to appellant's defense would make applicable this Court's principle in United States v. Grayson, 166 F.2d 863, 870 (2d Cir.,1948) (L. Hand, J.):

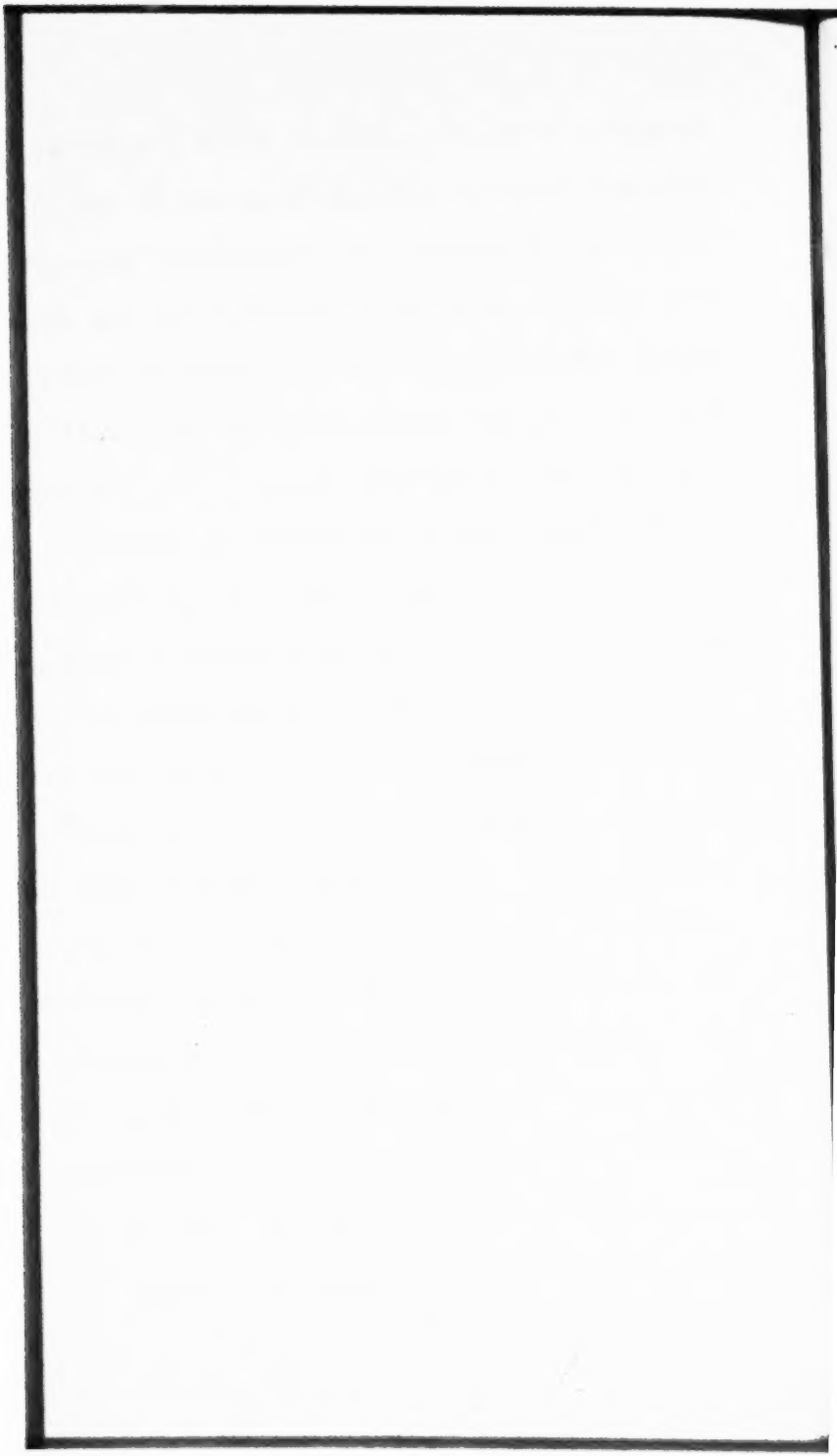
> a conviction should not stand when the accused has been denied access to documents relevant to his defense which are in the possession of a department of the Government, whose regulations make them unavailable at the trial.

See also, United States v. Andolschek, 142 F.2d 503 (2d. Cir., 1944); United States v. Beekman, 155 F.2d 580 (2d Cir., 1946); Christoffel v. United States, 200 F.2d 734 (D.C.Cir., 1953).

Finally, it must be noted that the Court compounded its denial of access to the information which would enable the defense to decide to call Romero, by then implying in its charge to the jury, that an inference might be drawn against the defense for their failure to call him. The Court charged specifically that no inference could be drawn against the government for its failure to call Romero whose testimomy would be repetitious of the Government's case, but neglected to charge, other than in general terms, that no inference could be drawn against the defense. In this instance, as well,there had been no request by the government for such a charge, and the defense had not argued a presumption against the government. See Point III, supra.

The Court further denied appellant her right to the effective assistance of

counsel, when it insisted that the trial proceed despite the explanation of the attorney of record, Mr. Brashich, that he was limited as a trial counsel in the criminal law and had retained Alvin Geller, Esq. to try the case, but that Mr. Geller was engaged in another trial. The failure of the Court below to accede to the request of William Gold, Esq., a partner of Mr. Geller's, that he be granted a twenty-four or thirty-six hour continuance to familiarize himself with the case, was an abuse of discretion. Only on that very morning had Mr. Gold been informed that he would have to substitute for Mr. Geller, and the Court forced him to trial when he knew absolutely nothing about the case. Certainly, "no postponement should be granted except for definite and certain reasons going to the heart of the fairness of the trial" (United States v.



Sanchez, 459 F.2d 100, (2d Cir., 1972)), but, in this case, those reasons were offered to the Court. Appellant had nothing to gain, other than her right to a prepared and informed counsel able to try a criminal case, in the short one or two day delay requested by Mr. Gold. The refusal of the Court to grant that request was to insist on expeditiousness rendering empty the right to defend. Ungar v. Sarafite, 376 U.S. 575 (1964).

CONCLUSION

FOR THE REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT

Respectfully submitted

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